THE CODE OF CONDUCT AT 42: TIME FOR A MIDDLE-AGE CHECK-UP

A Thesis Presented to
The Judge Advocate General's School
United States Army

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46TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 1998

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ABSTRACT: The Code of Conduct was written after the Korean War to respond to U.S. servicemen's perceived failings while Prisoners Of War (POW) in Korean POW camps. The Secretary of Defense believed that a Code of Conduct to guide U.S. POW while in captivity would provide a weapon for U.S. POW to respond to harsh conditions while in captivity. The Code was developed as an aspirational tool, to guide U.S. servicemembers while in captivity, and to counter the perceived Communist threat directed against the United States during the Cold War.

As training in the Code has evolved, it is no longer taught to the servicemembers it was intended to protect. It has evolved into highly specialized, compartmentalized training generally only given to pilots and Special Operations Forces. This regime has left the "fighting man" whom the Code was originally intended to protect without adequate tools to deal with a captivity situation, and does not recognize the evolution of the American military's mission since the Code's birth.

Therefore, this thesis will perform a middle-aged check-up of the Code's health to determine whether, at age 42, the Code is the vibrant and important training tool that its drafters intended it to be. As part of this check-up, I will propose that the Code be overhauled to face current realities, and that a training regimen be established that focuses on the servicemembers the Code was intended to protect. Secondly, I will propose that the Code's current distinctions between wartime and peacetime captivity be eliminated.

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I. Introduction

The Code of Conduct (Code) turned 42 this year.[1] And, as most other 42nd birthdays, the anniversary of the Code's birth was not a particularly noteworthy event. During its lifetime, the Code has seen service in one lengthy conflict, the Vietnam War, and several smaller conflicts, including Urgent Fury, Just Cause, and Desert Storm, and served as a foundation for U.S. servicemen while in captivity. It has also seen the end of the Cold War, and the fall of Communism. As the Code ostensibly enters middle age, examining its birth and subsequent use through these events is necessary to determine whether it is relevant today to the "American Fighting Man"[2] it was intended to support when written over 40 years ago.

A. Development of the Code

On May 17, 1955, Secretary of Defense Charles Wilson appointed a Committee to study how the Defense Department could provide an adequate foundation to U.S. servicemen for dealing with captivity in future conflicts.[3] Secretary Wilson recognized a need for a Code of Conduct to guide POW.[4] On July 29, 1955, a mere 10 weeks later, the Committee presented

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[1] Exec. Order No.10631, 20 Fed. Reg. 6057 (1955).

[2] The Code's original Article I language states "I am an American fighting man." The language was changed during the Reagan administration making it gender neutral, to: "I am an American, fighting in the service of my country." Exec. Order No.12633, 53 Fed. Reg. 10355 (1988).

[3] DEFENSE ADVISORY COMMITTEE ON PRISONERS OF WAR, POW, THE FIGHT CONTINUES AFTER THE BATTLE, THE REPORT OF THE SECRETARY OF DEFENSE'S ADVISORY COMMITTEE ON PRISONERS OF WAR, AUGUST 1955, 37 [hereinafter 1955 POW REPORT].

[4] *Id.* at 37.

the Code to Secretary Wilson. On August 17, 1955, President Eisenhower issued Executive Order 10631, a "Code of Conduct for Members of the Armed Forces of the United States."[5]

The Secretary of Defense's Committee drafted the Code to respond to U.S. servicemen's perceived failing while POW in Korean camps. During the Korean War, American newspapers featured scores of articles about Korean maltreatment of U.S. POW.[6] Even more disturbing accounts of communist indoctrination programs,[7] forced "germ warfare" confessions[8] and U.S. defectors[9] prompted Secretary Wilson's action.[10] The Communists fought total wars, not simply battles isolated to the common perception of the battlefield.

Their Korean captors had taken the battle to those Americans held in captivity, and public perception was that these servicemen lost that battle. It was this perceived failure that most concerned the Code drafters. No longer were men taken captive considered prisoners **of** war, but rather prisoners **at** war.[11] The American public perceived U.S. servicemen as woefully inadequate in this battle.[12] The military had given them machines of modern warfare to

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[5] Exec. Order No.10631, *supra* note 1.

[6] 1955 POW REPORT, *supra* note 3 at 1-2.

[7] *Id.* at 12-13.

[8] *Id.* at 14.

[9] *Id.* at 27.

[10] *Id.* at 37.

[11] *Id.* at 31.

[12] *Id.* at vi.

counter the enemy threat on the traditional battlefield, but no ideological grounding to confront that threat in the POW camp.[13] The Secretary of Defense's Committee developed the Code therefore as an aspirational tool, a moral guide to be given U.S. servicemembers for their conduct while in captivity, and to counter the perceived Communist threat directed against the United States during the Cold War.

B. Evolution of the Code

Today, after 42 years, U.S. servicemembers of all occupational specialties still use the Code as a tool to provide a moral guide for their actions should they become captives. From a drill instructor's fundamental discussions of the Code and its provisions given to basic trainees in a classroom environment,[14] to the intricate stratagems used by Special Operations Forces (SOF) and aviation personnel being trained in real-life POW scenarios,[15] the Code is used throughout DOD. The Code began as a simple moral code to guide all U.S. servicemen should they become captives, but has evolved into sophisticated doctrine for training pilots and SOF and the "American fighting in the service of my country."[16]

As the Code reaches middle age, however, is it capable of keeping up with the demands of the modern servicemember? Intended for use as a vehicle to train all servicemembers, the

[13] *Id.* at 31.

[14] U.S. DEP'T OF ARMY, REG. 350-30, CODE OF CONDUCT/SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING, para. 3-1 (10 December 1985) [hereinafter AR 350-30].

[15] *Id.* at para. 3-4.

[16] Exec. Order No.12633, *supra* note 2.

Code has evolved so that only selected servicemembers receive "first-class" training in its provisions.[17]

The Code is now taught to three levels of servicemembers.[18] These levels are based upon a servicemember's occupation and likelihood of being placed in an environment that makes them vulnerable to capture. "Level A" personnel are those servicemembers in non-deployable occupational specialties, who may only receive training that provides basic knowledge of the Code and its provisions. This training may be provided only once in a servicemember's military career.[19] "Level B" personnel are servicemembers in deployable units, or in an occupational specialty that entails a moderate risk of capture. These servicemembers may receive more extensive training in the Code.[20] Finally, SOF, pilots and those personnel whose roles entail a relatively high risk of capture are considered "Level C" and receive the most extensive training, including training at one of the service's Survival, Evasion, Resistance and Escape (SERE) schools.[21]

This regimen however, has left the "fighting man" whom the Code was intended to protect without adequate tools to deal with captivity, and does not recognize the evolution of

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[17] "The Committee unanimously agreed that Americans require a unified and purposeful standard of conduct for our prisoners of war backed up by a first class training program." 1955 POW REPORT, *supra* note 3 at vi.

[18] U.S. DEP'T OF DEFENSE DIR. 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT (DECEMBER 23, 1988) [hereinafter DOD DIR. 1300.7].

[19] *Id.* at para. C (5)(a).

[20] *Id.* at para. C (5)(b).

[21] *Id.* at para. C (5)(c).

the American military's mission since the Code's birth. The Code's proponent, the Joint Services SERE Agency, (JSSA) has not responded to the American military's shift in focus from the traditional force-on-force Cold War mission to the small-scale contingency mission. With the current emphasis on small-scale contingencies[22] involving coalition, North Atlantic Treaty Organization (NATO) or United Nations forces,[23] any servicemember in any occupational specialty may be a "fighting man" deployed into a potentially hostile environment. This includes National Guard and Reserve personnel.[24] Although DOD Directive 1300.7 purports to provide guidance for "peacetime" captivity scenarios,[25] this distinction fails to recognize that captivity, whether at the hands of an enemy or terrorist, is still captivity, and a servicemember still requires a guide for how to survive captivity and return with honor. Indeed, it ignores one of the fundamental premises for the Code, the fact that the Korean conflict was an undeclared war, which caused confusion among those Americans fighting for the United Nations.[26]

Therefore, this thesis will perform a middle-aged check-up of the Code's health to determine whether, at age 42, the Code is the vibrant and important training tool that its

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[22] "As the 21st century approaches, the nature of conflict continues to change from that of interstate war to that of intrastate conflicts." THE JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS II (16 JUNE 1997) [hereinafter HANDBOOK FOR PEACE OPERATIONS].

[23] *Id.* at I-1-I-2.

[24] Civil Affairs and Psychological Operations (PSYOP) teams for example may be needed for longer-term contingency operations. *Id.* at III-18-III-19.

[25] DOD DIR. 1300.7, *supra* note 18 at Enclosure 3.

[26] "The causes of the war, United Nations' objectives and the need for American intervention were not clearly delineated in the public mind. This lack of understanding prevailed among citizens and American fighting men." 1955 POW REPORT, *supra* note 3 at 7.

drafters intended it to be. Is the Code destined to become a Cold War anachronism like the Fulda Gap, or the Iron Curtain? Or, can DOD revitalize the Code like NATO to respond to a New World order?

As part of this check-up, I will propose that the directive used to guide Code training be changed to face current realities. Therefore, the distinction between Level A, B and C personnel should be eliminated, and only two levels of Code training should remain. Secondly, I will recommend that DOD eliminate the Code's distinctions between wartime and peacetime conduct. With this country's current emphasis on small-scale contingencies, the likelihood has grown of a U.S. servicemember being taken captive in the absence of a declared conflict. If the Code is to be an adequate tool for American servicemembers to deal with all captivity scenarios, it must be revitalized to deal with this contingency. Finally, I will propose an annual training schedule that provides a base of knowledge for all servicemembers to guide their conduct should they become captives, which can be easily supplemented should their mission, assignment or occupational specialty change.

I will begin my analysis with a review of this nation's captivity experiences. The 1955 committee that drafted the Code had a wealth of POW experience from which to construct the Code's provisions. Therefore, I will examine this country's POW experiences, to determine what experiences were important to the Code's drafters. I will also develop what guidelines, if any existed for POW conduct while in captivity prior to the Korean War. I will discuss POW conduct in Korea to determine what the Code drafters were attempting to resolve by promulgating the Code. I will also review POW conduct in conflicts since Korea to determine if the Code was an adequate tool for American servicemembers in captivity.

II. The American Revolution

A. Introduction

Although customary international law regarding POW treatment existed at the beginning of the American Revolution, these customs had not yet been codified.[27] While POW could expect better treatment than POW during former times,[28] the lot of many POW captured by both the British and Americans during the Revolution was arguably not much better. The British and American forces subjected POW to a system of *ad hoc* measures, none of which were designed to lessen their suffering or protect them.[29] Rather, POW were political pawns,[30] subject to commanders' whims who captured and controlled them. The American

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[27] "In the last half of the eighteenth century the more humane prescriptions of the Geneva and Hague agreements, and treaties to be embodied in international law and practice, were still in the womb of the future, with the result that the treatment of prisoners seem to have depended in undue measure on the will or whim of the individual to whose custody they were confided." CHARLES H. METZGER, S.J., THE PRISONER IN THE AMERICAN REVOLUTION Viii (1971).

[28] "Amongst the Greeks, captives were sometimes indiscriminately put to death, sometimes enslaved, or sold into slavery—though to fellow Greeks and not to barbarians." COLEMAN PHILLIPSON, 2 THE INTERNATIONAL LAW AND CUSTOM OF GREECE AND ROME 251 (1911).

[29] "The American States during the Revolution apparently tried to live up to the rules of customary international law. However, the British usages appear to have vacillated between the practices observed in international law and the usages permissible in quelling domestic disturbances." WILLIAM E. S. FLORY, PRISONERS OF WAR 16 (1942).

[30] "A good deal of the suffering endured by captives of both sides arose from the inability of the belligerents to achieve a political breakthrough and to arrive at a formal settlement to protect prisoners from the miserable conditions that became common in the Revolution. So the belligerents utilized any expedient they could devise to meet their responsibilities, and the prisoners were the victims of what could be best described as a haphazard code of conduct regarding the treatment of captured personnel." LARRY BOWMAN, CAPTIVE AMERICANS: PRISONERS DURING THE AMERICAN REVOLUTION 5 (1976) [hereinafter CAPTIVE AMERICANS].

Revolution gave birth to the United States and exposed some issues regarding POW treatment that would be repeated in later conflicts.[31] As this country's first POW experience, the Revolution deserves examination.[32]

B. The importance of conflict characterization

The British characterized the revolution as a mere armed rebellion.[33] Thus, for political and diplomatic purposes, British treatment of POW was premised entirely on avoiding the recognition of the colonies' independence.[34] For a majority of the war,[35] the British government refused to recognize America as a sovereign,[36] therefore, captured POW were not considered POW at all, rather they were considered "rebels."[37] This policy served three viable ends: First, the government avoided formal recognition of the sovereignty of the Continental Congress or any of the separate states as independent governments. The British government could steadfastly refuse to deal with any of these entities because they were not

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[31] The fact that neither side was prepared to handle POW was repeated—with disastrous consequences—in the United States Civil War. *See* discussion *infra* Part III.B.

[32] The tension between POW protections during an International Armed Conflict and an "intrastate armed conflict" characterized above are particularly relevant today. *See* discussion *infra* Part IX.E.

[33] *See generally*, REPORT OF A COMMITTEE APPOINTED BY THE MASSACHUSETTS HISTORICAL SOCIETY ON EXCHANGE OF PRISONERS DURING THE AMERICAN REVOLUTIONARY WAR, presented December 19, 1861.

[34] CAPTIVE AMERICANS, *supra* note 30 at 104.

[35] Olive Anderson, *The Treatment of Prisoners of War in Britain during the American War of Independence, in* 28 BULLETIN OF THE INSTITUTE OF HISTORICAL RESEARCH 63 (May 1955).

[36] Anderson characterizes the American War of Independence as two wars. The first war, from 1777 to 1781 she considers a civil war. The period six months after the British defeat at Yorktown where the British parliament recognized the status of American "rebels" as prisoners of war, she considers a separate war. *Id* at 63.

"sovereigns."[38] Individual military commanders controlling POW, therefore, were largely left to determine the treatment they received. American commanders often negotiated with local British commanders who could only give their word as gentlemen concerning prisoner release.[39] The British government's posture prevented large-scale prisoner exchanges throughout most of the war.[40]

Secondly, this lack of recognition sent an implicit message to other European governments anxiously watching the conflict. The message to other governments was that this was an internal armed conflict and other governments should refrain from taking sides in it.[41]

Finally, by attaching the moniker "rebel" to captured POW, the captives were made subject to British law concerning rebels. Rebels were no more than common criminals, and could be tried as such.[42] This served the supplementary purpose of justifying the British

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[37] *Id.* at 82-83.

[38] Complicating the relationship between the Americans and the British was the relationship between the Continental Congress and the 13 States. "The Continental Congress faced a knotty problem in prisoners. Denied all legality by the British government and its military representatives in America, and hampered by the opposition and at times the defiance of one or several states, Congress must be vigilant and circumspect. True, it is improbable that, except to vex or thwart Congress, the British would attempt to deal with an individual state over parole or exchange because even such procedure would imply that the state enjoyed the status of a belligerent commonwealth. This admission, they could not make." METZGER, *supra* note 27 at 295.

[39] "Exchanges were to be negotiated by the British military commanders in whatever fashion they deemed proper. The negotiations which preceded an exchange were to be conducted in a manner which pledged the honor of the commander, and not the government, that the bargain would be consummated." CAPTIVE AMERICANS, *supra* note 30 at 104.

[40] *Id.* at 105-109.

[41] *Id.* at 104.

government's practice of confining POW in jails with common criminals, a practice to which General Washington objected on numerous occasions.[43]

C. POW maintenance during the war

At the beginning of the war, it was clear that neither side was prepared to deal with POW. The British had prepared for a short conflict,[44] and the newly-formed United States had not resolved the issue of responsibility for POW.[45] The treatment accorded POW reflects this attitude. After the battle of Bunker Hill, 30 American POW were detained in Boston jails.[46] As the number of American POW began to grow, the British began to use "field expedient" structures as POW camps.[47] Eventually, even this became too unwieldy and the British began to use the infamous prison ships to warehouse American POW.[48] Captured British and

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[42] The "British authorities eschewed the term prisoners of war and persisted in designating them rebels. The implications were rich in foreboding." METZGER, *supra* note 27 at 293-294.

[43] CAPTIVE AMERICANS, *supra* note 30 at 15.

[44] *Id.* at 8-9, 98.

[45] METZGER, *supra* note 27 at 294-295.

[46] REPORT OF A COMMITTEE APPOINTED BY THE MASSACHUSETTS HISTORICAL SOCIETY ON EXCHANGE OF PRISONERS DURING THE AMERICAN REVOLUTIONARY WAR, presented December 19, 1861, *supra* note 33 at 7.

[47] *See generally*, CAPTIVE AMERICANS, *supra* note 30 at 8-14. "The private solders, who were brought to New York, were crowded into churches. . . The floors were covered with excrements (sic). . .The provision dealt out to the prisoners was by no means sufficient for the support of life. It was deficient in quantity, and much more so in quality. The prisoners often presented me with a sample of their bread, which I certify was damaged to that degree, that it was loathsome and unfit to be eaten, and I am bold to aver it, as my opinion, that it had been condemned. . . I saw some of them sucking bones after they were speechless." ETHAN ALLEN, A NARRATIVE OF THE CAPTURE OF TICONDEROGA AND OF HIS CAPTURE AND TREATMENT BY THE BRITISH, WRITTEN BY HIMSELF 34 (1849).

[48] CHARLES E. WEST, HORRORS OF THE PRISON SHIPS 2-3 (1895).

German soldiers often did not fare much better as they were housed in areas which sometimes did not even amount to camps. [49]

While not recognizing their status as POW, the British used parole to avoid caring for and feeding officer and enlisted POW.[50] Paroles also allowed the British to show that they were humanely treating their prisoners.[51] The British also paroled officers in those geographic areas that they controlled in an attempt to secure similarly favorable treatment for their own captured officer POW.[52] Thus, after a long period of captivity, Ethan Allen, who with is "Green Mountain Boys" had captured the British fort at Ticonderoga, but who was captured in a subsequent battle was paroled in New York.[53]

D. British recruiting attempts in POW camps

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[49] German and British prisoners who were surrendered at the Battle of Saratoga were marched from Saratoga to Boston to Charlottesville, Virginia. When they arrived in Charlottesville in January of 1779, they were forced to finish construction on the "barracks" which were to serve as their POW camp. M.H. VOLM, THE HESSIAN PRISONERS IN THE AMERICAN WAR OF INDEPENDENCE AND THEIR LIFE IN CAPTIVITY 14-15 (1937).

[50] "Traditionally, a parole simply meant that a prisoner gave his word of honor, if he was released from captivity or given special privileges, to abide by the restrictions placed upon him by his captors. It was usually a promise to take no further part in the fighting until officially exchanged as a prisoner of war." CAPTIVE AMERICANS, *supra* note 30 at 97.

[51] "At the beginning of the war, men were allowed to simply return to their homes. This reduced the demand for prison quarters and was calculated to create the impression of a forceful yet humane adversary." *Id.* at 98.

[52] *Id.* at 98.

[53] ALLEN, *supra* note 47 at 33.

The British also believed that paroling officers, thereby separating them from their men, would improve the chances of enlisting U.S. soldiers into the British Army.[54] The recruitment program in POW camps was well choreographed.[55] The policy was so pervasive, that General Washington wrote General Howe and officially protested it in January 1777.[56] Washington linked the deplorable conditions found in POW camps to the recruitment program.[57] Congress also forbid American forces from the enlistment of enemy captives or deserters into the U.S. forces, and ordered that these forces be purged. Congress hoped that by doing this, American POW treatment would improve.[58]

As a result of the British recruitment practices, M'Carty, a Continental Army soldier enlisted in the British forces, remaining with them for a period of ten or eleven months.[59] He was subsequently indicted for high treason for joining the British Army, and sought to defend his conduct because he had been coerced into enlisting. Writing for the court, Chief Justice McKean, set out the conditions under which such enlistment could be justified, and thereby defined the limits of a duress defense:

> It must be remembered, that, in the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the

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[54] CAPTIVE AMERICANS, *supra* note 30 at 98.

[55] "Soon after the men were captured, they were approached by recruiting officers who emphasized the boredom, disease, and the peril prison life offered and presented the captives with the opportunity to avoid the horrors of long confinement by entering his Majesty's service." *Id.* at 94.

[56] JARED SPARKS, IV THE WRITINGS OF GEORGE WASHINGTON 274 (1838).

[57] *Id.* at 277.

[58] CAPTIVE AMERICANS, *supra* note 30 at 95.

[59] Respublica v. M'Carty 2 U. S. (2 Dall) 86, 87 (1781).

> apprehension of any outrage upon property. But had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.[60]

Although codification efforts of the customary laws of war would continue after the American Revolution,[61] this country's infancy also provided the infancy of several Code concepts. First, the consequences of conflict characterization, and the effect it has on POW treatment were developed. Second, commanders, in the absence of any agreements to the contrary, determined the type of treatment POW received. The propaganda aspects of parole, and the reasons behind the Code's obligation to receive approval from the Senior Ranking Officer (SRO) before accepting parole were developed. Finally, the duress defense was defined.

III. The American Civil War

POW treatment during the American Civil War typically invokes images of the horrors of Union prisoners held in Confederate prison camps like Andersonville, Libby, and Belle Isle. A more positive and lasting legacy of the war, however, does exist. In 1863, the War Department published Francis Lieber's *Instructions For The Government of Armies of the United States in the Field,* as General Order No.100 (GO 100).[62]

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[60] *Id.* at 87.

[61] "The 1785 Treaty of Amity and Commerce between Prussia and the United States contained a provision (Article XXIV) which probably constituted the first international attempt to provide in time of peace for the protection of prisoners of war in the event that the then friendly relations between the two countries should be disturbed by war." HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 5-6 (1977).

[62] The War Department, Adjutant General's Office, General Orders No. 100 (April 24, 1863) [hereinafter GO 100]. WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE

Lieber was greatly concerned with the conduct of war. As a boy, he had fought against the French at Ligny, close to Waterloo, and was seriously wounded at Namur.[63] Lieber also had a personal stake in the conduct of the Civil War, as three of his sons had volunteered to fight in it.[64] Although experiencing the horrors of war first-hand, Lieber nevertheless believed that there was a moral aspect to the conduct of war.[65] Stated in the first section of GO 100, the over-arching purpose and perspective of GO 100 appears: "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God."[66]

The instruction itself is a series of loosely organized policy statements, rules and instructions for the conduct of conflict. Although commanders are given controversial

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ARMIES, SERIES II, VOL. V, 671-682 (1898) [hereinafter OR, series, volume and page] (This set of official records is contained in 196 volumes identified by similar volumes and series. This citation is the only way to adequately focus the researcher.).

[63] Lieber was shot through the neck and chest and left to die. He attempted to have a comrade shoot him, but was ultimately rescued by another comrade after having his body searched by local peasants. James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS, 34, 42 (1976). *See also* Francis T. Lieber, *Personal Reminiscences of the Battle of Waterloo* 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LEIBER, 151-171 (1881).

[64] Two of his sons fought for the Union, and one of his sons fought for, and was ultimately killed, while serving for the Confederacy. Theodore Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COL J. TRANSNAT'L. L. 269, 270 (1997). Lieber's oldest son, G. Norman Lieber, eventually served as the United States Army's Judge Advocate General.

[65] Professor Johann Caspar Bluntschli, of the University of Heidelberg, a frequent correspondent and Lieber friend wrote of Lieber's over-arching belief in the moral aspects of the conduct of war. "His legal injunctions rest upon the foundation of moral precepts. The former are not always sharply distinguished from moral injunctions, but nevertheless through a union with the same, are ennobled and exalted." J. Caspar Bluntschli, *Introduction* to 2 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER: CONTRIBUTIONS TO POLITICAL SCIENCE 12 (1881).

[66] The moral underpinnings for Lieber's code are stated in Article 15, which discusses the overall concept of military necessity. GO 100, *supra* note 62 art. 15.

authority in dealing with besieged cities,[67] and handling POW under some circumstances,[68] it formed the basis of later conventions for the protection of combatants and non-combatants.[69] GO 100's far-reaching provisions include a number of articles dedicated to POW treatment. I will use these articles as a general framework in discussing the war's exchange and treatment of POW.

A. POW exchanges.

GO 100 articulates a "number for number, rank for rank" system to exchange prisoners. In the alternative, it provides that the parties may substitute a certain number of inferior officers and soldiers for those superior in rank.[70] GO 100's publication in 1863 unfortunately, did nothing to improve an exchange system plagued with difficulties.

At the beginning of the Civil War, the POW exchange system was similar in many respects to the exchanges conducted during the American Revolution. Because no formal agreement for POW exchange existed, local commanders handled exchanges and paroles.[71]

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[67] Article 18 allowed a commander laying siege to a city to drive the inhabitants back into the city "so as to hasten on the surrender." *Id*. at art. 18.

[68] "No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners." *Id*. at art. 60 (emphasis in the original).

[69] "Despite its structural flaws, inconsistencies, and other difficulties, General Orders 100, a mixture of a textbook and a code, as Lieber himself recognized, stands as a monument and a signpost and, moreover, an inspiration to constant reflection on morality and law in war, not only on the land, but also in the sea and in the air." CHILDRESS, *supra* note 63 at 70.

[70] GO 100, *supra* note 62 arts. 105, 106, 108-110 deal specifically with POW exchanges.

Because of the Union's fear that recognition of the Confederacy might signal recognition of its sovereignty, few exchanges occurred. In December 1861, a House and Senate joint resolution granted the President the authority to exchange POW. The resolution further stated that such exchanges did not involve recognition of the Confederacy as a government.[72] Finally, on July 22, 1862,[73] a formal cartel was signed, and the parties began formal POW exchanges. Exchanges and paroles continued in a haphazard way for almost two years, until General Grant ordered them halted on April 17, 1864.[74]

B. POW treatment

GO 100 codified the customary law notion that POW are state captives.[75] Although Lieber did not specifically provide for the general maintenance of POW, he did state the type

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[71] THOMAS P. KETTELL, HISTORY OF THE GREAT REBELLION 197 (1866).

[72] "Whereas, the exchange of prisoners in the present rebellion has already been practiced indirectly, and as such exchange would not only increase the enlistment and vigor of our Army, but subserve the highest interest of humanity and such exchange does not involve recognition of the rebels as a government; therefore resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, that the President of the United States be requested to inaugurate systematic measures for the exchange of prisoners in the present rebellion." OR, *supra* note 62 II, III at 157.

[73] This cartel was negotiated by Generals Dix and Hill, and is therefore commonly referred to as the Dix-Hill cartel. OR, *supra* note 62 II, IV at 266-268.

[74] BENJAMIN F. BUTLER, BUTLER'S BOOK 596 (1892). Major General Butler was appointed commissioner for the exchange of prisoners in November 1863. *Id.* at 584. In his discussion of the POW exchange program, he details the reasons for Grant's halting of the POW exchanges. Grant recognized that the South was short on manpower, and that previous paroles of southern prisoners had led simply to these men being captured in later conflicts after reenlisting in the Confederate forces. Further the Union had a numerical advantage in the numbers of prisoners held. Finally, the South refused to recognize the POW status of free slaves who fought in the Union Army, choosing to return them to their Southern masters or try them in state courts under the provisions of President Jefferson Davis's December 24, 1862 proclamation. *See generally id.* at 584-606.

[75] "A prisoner of war being a public enemy, is the prisoner of the government, and not of the captor." GO 100, *supra* note 62 art. 74.

of food they were to receive.[76] POW treatment though reflected the captor's respective fortunes in the war.[77] In his *History of Andersonville Prison*, Ovid Futch sets the stage for Union prisoner treatment by showing how construction on Andersonville prison began. His discussion shows how a captor's fortunes can have tragic consequences for its captives:

> These difficulties experienced by the architects and builders of Andersonville prison are suggestive of the troubles that continued to beset its administrators throughout its existence. There is something pathetic about Dick Winder's[78] [Captain Winder was assigned to oversee construction and administration of the camp] futile entreaties for supplies and equipment for Andersonville. One gets the impression from reading his letters that a man more capable of efficient organization and more skilled in handling men might have achieved greater success. But it can never be known to what extent it was an unavoidable result of the dwindling fortunes of the Confederacy. The prisoners of war who were to suffer and die in Andersonville during the approaching months would reap a portion of the results of a government's attempt to do more than it was capable of doing.[79]

Major General Butler supported this view.[80]

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[76] Article 76 provided "prisoners of war shall be fed upon plain and wholesome food whenever practicable, and treated with humanity." *Id.* at art. 76.

[77] "The disposition of prisoners of war cannot be considered apart from the social, economic, and military situation existing at the time they were captured, since it is only by reference to these forces that the treatment accorded prisoners can be explained or interpreted." FLORY, *supra* note 29 at 10.

[78] Captain Winder was the son of Brigadier General John Winder, who would later be appointed as the Confederacy's Commissary General of prisons.

[79] OVID L. FUTCH, HISTORY OF ANDERSONVILLE PRISON 9 (1968).

[80] "While I do not mean to apologize for or palliate the manner in which our prisoners were treated, which was inexcusable, I feel bound to say that from careful examinations of the subject I do not believe that neither (sic) the people or the higher authorities for the Confederacy were in so great degree responsible as they have been accused. In the matter of starvation the fact is incontestable that a soldier of our army would have quite easily starved on the rations which in the latter days of the war were served out to the Confederate soldiers before Petersburg." BUTLER'S BOOK, *supra* note 74 at 610.

Although the Confederacy passed legislation early in the war concerning POW,[81] Brigadier General John H. Winder's appointment as commander of only certain military prisons, with no authority to provide for these prisons' maintenance, support or supply, plagued the system from the outset. The Confederacy did not create a Commissary General of prisons until November 1864.[82] Contrast this with the Union Quartermaster General who recognized the necessity for a Commissary General as early as July 1861.[83] Lieutenant Colonel William Hoffman, who would serve as Commissary General for prisoners throughout the war, was appointed October 23, 1861.[84]

C. Other classifications [85]

GO 100 Article 48 specifically treats deserters, and allows deserters from either side to be killed upon recapture. This Article, however, did not stop the Union from recruiting amongst its captured prisoners, and upon enlistment into the Union Army, from placing them into service. These soldiers, "Galvanized Yankees," were usually sent to the western frontier to

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[81] The Congress of the Confederate States of America approved "An act relative to prisoners of war on May 21, 1861." OR, *supra* note 62 II, III at 680-681.

[82] BG Winder was appointed Commissary General in Nov 1864. *Id*. at II, VII, 1150.

[83] Major General M.C. Meigs sent a letter to Secretary of War Simon Cameron asking for the appointment of a commissary of prisons on July 12, 1861. *Id*. at II, III, 8.

[84] *Id*. at II, III, 121.

[85] For an excellent index of the portions of GO 100 that were incorporated into the 1899 Hague Convention With Respect to The Laws and Customs of War on Land, see the Appendix to the opening address by Elihu Root as President of the American Society of International Law at the Seventh Annual Meeting, Washington, April 24, 1913, 7 AM. J. INT'L L 453 (1913).

fight the Indians.[86] Chaplains and medical personnel were not treated as POW in GO 100, unless they chose to stay with captured companions; in which case they were treated as POW, and were subject to exchange.[87]

Lieber also treats the subject of black POW in GO 100. In Article 57, he defines a belligerent as any person who takes up arms for his country and takes the soldier's oath of fidelity. In Article 58, he states that "the law of nations knows of no distinction of color," and if an "enemy of the United States should enslave and sell any captured person" the United States would retaliate by placing a Confederate POW in hard labor for the remainder of his confinement. Should a black POW be killed, the United States would retaliate by killing a Confederate POW.[88] This squarely contradicted the Confederacy's declaration that all captured black prisoners were to be turned over to States' governors for punishment under state laws.[89]

D. Code of Conduct predecessors

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[86] In his book, Major General Butler relates his success in this area. "Of the ten thousand prisoners at Point Lookout, two regiments of infantry were enlisted, and many recruits went into the navy upon the solemn engagement that they should not be sent South to fight their rebel brethren. These regiments were afterwards sent to General Pope to fight the Indians, and did good service during the war." BUTLER'S BOOK, *supra* note 74 at 587.

[87] GO 100, *supra* note 62 art 53.

[88] President Lincoln issued General Order 252 on July 31, 1863, which approved this scheme for retaliation. OR, *supra* note 62 II, VI at 163.

[89] In a far-reaching declaration on January 24, 1862, which includes a statement that Major General Butler was a criminal, subject to immediate hanging upon capture by Confederate soldiers, President Davis proclaimed that

The Civil War also produced several Articles that may be considered predecessors to the current Code. General Order 207,[90] which prohibited officers and soldiers from accepting paroles[91] from the Confederacy, and placed an affirmative duty upon them to attempt to escape,[92] is a predecessor to Article III of the Current Code. GO 100 also recognizes the captors' right to shoot a POW who attempts to escape in Article 77.

The Code's Article V obligations are stated in two Articles in GO 100. In Article 80, Lieber exhorts "honorable men" who "when captured will abstain from giving to the enemy information concerning their own army."[93] Article 107, places an affirmative obligation upon a POW, who is "honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him."[94]

As a result of the Civil War, the first provisions regarding POW treatment and their corresponding conduct were codified. Although stated generally, they formed the basis for later codifications.[95]

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all captured blacks would be tried as criminals in state courts or returned to their former masters. *Id*. at II, V, 795-797.

[90] *Id*. at II, VI, 78-79.

[91] The Code's Article III states U.S. servicemembers "will accept neither parole nor special favors from the enemy." Exec. Order No.10631, *supra* at note 1.

[92] Article III further places an obligation upon U.S. servicemembers to "make every effort to escape and aid others to escape." *Id.*

[93] Article V's language states "I will evade answering further questions to the utmost of my ability." *Id.*

[94] This provision is the forebear of Article V's requirement that "When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth." *Id.*

[95] ROOT, *supra* note 85, at 456-457.

IV. World War I

A. Introduction

Three subsequent international conventions continued Lieber's efforts to codify the customary laws of war regarding POW treatment after the American Civil War and before World War I (WWI). The Brussels Conference on Laws and Customs of War of 1874 focussed on defining a POW and the treatment expected for POW.[96] Although the conference did not result in any binding international agreements, its provisions influenced later multilateral efforts.[97] The Regulations Respecting the Laws and Customs of War on Land attached to the Second Hague Convention of 1899 continued these discussions.[98] Unlike its predecessor, the Hague Convention did produce the first multilateral law of war agreement whose signatories included the United States.[99] The final codification of POW

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[96] Baron Jomini, the Russian representative to the Brussels convention, summed up the purpose of the conference thusly: "If it were possible to state precisely in a practical measure, by general agreement, what, on the one hand, the necessities of war permit, and what, on the other hand, the general interest of humanity forbids . . . it is unquestionable that an important step would be gained towards regulating that evil and diminishing its calamities, which are too often caused by the uncertainty and ignorance which still exist on this subject." 2 PROCEEDINGS, BRUSSELS CONFERENCE ON LAWS AND CUSTOMS OF WAR 189 (1874)[hereinafter PROCEEDINGS].(A compilation of parliamentary papers, 1874-1876, maintained at TJAGSA special collections.).

[97] "While the Declaration of Brussels, which emanated from that conference never entered into effect as an international agreement, it unquestionably had a very considerable influence on subsequent governmental codification efforts, which were successful." HOWARD S. LEVIE, INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL CONFLICT 8 (1977).

[98] The introductory provisions of the 1899 convention, when stating the purpose of the convention, use language that is strikingly similar to the language of the Brussels convention: "Thinking it important. . .to revise the laws and customs of war, whether with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible." 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 221 (Leon Friedman ed., 1972).

rights and protecting states' obligations toward them prior to WWI was the Hague Convention of 1907. This convention was in effect during WWI.[100] Taken as a whole, these three conventions clarified POW rights and protecting states' obligations towards them.

The 1899 and 1907 Hague conventions were binding upon the WWI combatants[101] as signatories to them. Although a number of bilateral agreements between the parties supplemented the 1899 and 1907 agreements during WWI,[102] the Conventions' protections may be viewed apart from these agreements. Articles VII-IX of the 1899 Conventions dealt with POW treatment and captors' obligations toward them. With minor changes, these Articles formed the basis of Articles 7-9 of the Annex to Hague Convention IV. Article 7 specifically provides for the food, quarters, and clothing to be provided POW. Article 8 describes escaping POW and the use of force that may be used to prevent an escape. Article 9 deals with the information a POW is required to give his captors.[103] For analytical purposes, I will treat the 1899 and 1907 provisions the same, because there were few major substantive changes between the provisions of these conventions.

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[99] Although Article II's "general participation clause," which limited application of the 1899 convention to conflicts between contracting parties has been criticized, *see* EDWARD OPPENHEIM, INTERNATIONAL LAW 234 (Hersch Lauterpacht ed., 7th ed. 1952), the major WWI belligerents were all signatories to the 1899 Convention.

[100] LEVIE, *supra* note 97 at 9.

[101] For an excellent discussion of the 1899 and 1907 conventions and the obligations of each on the WWI belligerents, *see* JAMES W. GARNER, 1 INTERNATIONAL LAW AND THE WORLD WAR, 18-23 (1920).

[102] LEVIE, *supra* note 97 at 9.

[103] Article 9 provides: "Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank." The verb "bound" was used in the Code's original Article V but was changed after the Vietnam War. As we will see later, "bound" was perceived as too inflexible to the 1976 Committee that reviewed the Code. *See* discussion *infra* Part VIII B.

We will also examine the U.S. role as a neutral at the beginning of WWI. In assuming its neutral role, the U.S. undertook the protection of POW.[104] Therefore, the focus of our analysis will be twofold: First, the effect that the continuing codification of POW treatment had on the WWI POW, and second, the U.S. role as a neutral in attempting to enforce the provisions of the conventions mentioned above.

B. Codification of POW rights.

Although Lieber codified then-existing customary law with respect to POW rights and their treatment, these later conventions altered his basic document. Lieber's code served as the first codification of POW treatment. Therefore, I will use three specific provisions of GO 100 and show how the Brussels convention and the later Hague conventions altered their baseline provisions. From this analysis, we will see the treatment POW were supposed to receive in WWI.

1. Escapes—The three subsequent codifications of POW treatment recognized a POW's inherent right to escape.[105] In contrast to Lieber's article dealing with escaping POW,[106] as well as the Brussels convention on escaping POW,[107] there is no provision for the use of force for stopping escaping POW in either the 1899 or 1907 Conventions.[108]

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[104] RICHARD B. SPEED, PRISONERS, DIPLOMATS AND THE GREAT WAR 187 (1990).

[105] FLORY, *supra* note 29 at 148.

[106] Article 77 recognized that a POW who escapes might be shot or otherwise killed in his flight. GO 100, *supra* note 62, art. 77.

GO 100's imposition of punishment for escape attempts or unsuccessful escapes was also modified in later conventions. GO No.100 stated that no punishment shall be inflicted upon an unsuccessful escapee, but that stricter means of security shall be used after an unsuccessful attempt at escape.[109] The 1874 Brussels convention recognized that an unsuccessful escapee may be subject to "summary punishment or to a stricter surveillance."[110] The 1899 and 1907 conventions stated that the punishment of prisoners captured while escaping was limited to "disciplinary punishment."[111] Because "disciplinary punishment" was not defined in the 1907 convention, it became the subject of separate agreements.[112]

The treatment accorded an unsuccessful escapee was the subject of one charge in the post WWI war crimes trial of Sergeant Karl Heynen.[113] Sergeant Heynen was a POW camp

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[107] The use of force to prevent escapes was given special consideration in the 1874 convention. The Swiss delegate first proposed inserting a warning requirement prior to the use of force. PROCEEDINGS, *supra* note 96, at 215. The Spanish delegate proposed that a POW should be warned three times to stop prior to using force. It was his perception that a warning could be issued simultaneous to firing at a POW. *Id.* at 289. Ultimately, the language proposed by the Swiss delegate was adopted. The Article therefore provides that "arms may be used after summoning, against a prisoner attempting escape." *Id*. at 322.

[108] FLORY, *supra* note 29, at 151.

[109] GO 100, *supra* note 62, art. 77.

[110] PROCEEDINGS, *supra* note 96, at 322.

[111] One author recounts a typical example of disciplinary punishment for a failed escape attempt. After being captured on a train platform before perfecting his escape attempt, Able Seaman James Ferrant and his fellow escapees were returned to their POW camp. "We were stripped and put into prison garb and given clogs, then banged into cells to await our sentence. We were five days on bread and water awaiting sentence, which was fourteen days 'strong arrest.' This meant bread and water, soup every fourth day, pitch dark cells and no exercise. And this is where our bid for liberty landed us." MICHAEL MOYNIHAN, BLACK BREAD AND BARBED WIRE 16 (1978).

[112] In order to overcome their differences in this matter, Britain and Germany agreed to limit the penalty for a simple escape to fourteen days "military confinement." SPEED, *supra* note 104 at 38.

commander for a short period of time. Although 14 of the 15 charges of which Sergeant Heynen was convicted concerned his abuse of POW during everyday camp activity, one of the charges recounted by the court was the treatment accorded McDonald and another British POW who escaped and were recaptured. In finding Heynen guilty of abusing McDonald upon his return to the camp, the court stated: "Immediately on their return the accused, who was very angry at their flight, ill-treated them in the detention cell. He used his fist and rifle-butt."[114]

2. Interrogation—GO 100 had two provisions regarding POW interrogation. The first placed an affirmative obligation upon POW to state their name and rank.[115] The second provision placed limits upon a captor's use of force to compel further answers.[116] This second provision is not stated in any of the later conventions. The later conventions state only the POW's affirmative obligation to state his name and rank and place no limits upon a captor's use of physical violence to compel a POW to answer further questions.[117] Creative,

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[113] In what is considered one of the first "War Crimes" trials, six German defendants were tried for offenses committed during the war. Three defendants were POW camp commanders, and three were submarine officers or seamen. Sir Ernest Pollock, *Introduction* to CHAUD MULLINS, THE LEIPZIG TRIALS 5-14 (1921).

[114] *Id.* at 58.

[115] GO 100, *supra* note 62 art.107.

[116] *Id.*, at art. 80.

[117] It does not appear that the Germans resorted to these techniques during WWI. In one interrogation account, Rifleman Ernest Evanson, who later successfully escaped from his POW camp, details a very civil discussion he had with a German General upon his initial capture. After discussing his life in London as an accountant, and the General's own business acquaintances in London, "He then went on to ask me questions of a military nature and I was shown detailed maps of both our and the German trenches. In this way he endeavored to get information out of me, but I stood quite still and refused to open my mouth at all. He seemed to be getting rather annoyed, and I was much relieved when he ordered me to be taken out, with the words, 'There will be more along later who will tell us more.'" MOYNIHAN, *supra* note 111 at 61.

non-violent methods did replace the more traditional abusive techniques, in some instances.[118] During WWI, it is doubtful that officers failed to state properly their rank.[119]

C. Food, clothing and quarters

In GO 100, a captor's obligation to feed POW is stated simply.[120] In the later conventions, these obligations were expanded to include the general maintenance of POW. The Brussels convention requires the provision of food and clothing which is "on the same footing as the troops of the Government" holding them prisoners.[121] This language is repeated, and "quarters" appears in Article VII of both the 1899 and 1907 conventions.

1. U.S. role as neutral--The U.S. spent approximately 30 months of WWI as a neutral.[122] Shortly after the conflict began, the U.S. was asked by the major belligerents to protect their interests in enemy territory.[123] The U.S., therefore, undertook the enforcement of the Hague

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[118] "While physical violence was to be avoided, it was considered quite proper during World War I to make a prisoner stand to attention for long sessions during his examinations and to withhold food and water until he was prepared to cooperate." A.J. BARKER, PRISONERS OF WAR 60 (1975).

[119] If any POW ever deserved the title of "spoilt-darling" which one author gave them in 1911, it is the officer POW of WWI. In sharp contrast to the treatment, which the other-ranks received, officer POW were given adequate food, recreation, entertainment and educational opportunities. To appreciate how stark the contrast between officer and enlisted was, compare the accounts of Captain Douglas Lyall Grant and Private Norman Dykes who served as a valet in the Schwarmstedt POW camp where both were confined. Grant wrote in his wartime diary of playing tennis with Russian nobility while Dykes was constantly concerned with adequate food. JAMES SPAIGHT, WAR RIGHTS ON LAND 79-140 (1911).

[120] GO 100, *supra* note 62, art. 76.

[121] PROCEEDINGS, *supra* note 96, at 27.

[122] SPEED, *supra* note 104 at 187.

[123] *Id.* at 20-21.

Convention through a system of camp inspections.[124] Although these inspections initially were performed as part of a relief effort, as the effort continued, they served to improve camp conditions and defuse allegations of mistreatment by the major belligerents.[125]

While these inspections improved conditions in POW camps, they were not a cure-all. As in previous conflicts, a POW's fate often depends upon his captor's fortunes. WWI was no exception to this rule. The U.S. role in providing relief packages to the POW early in the war served to limit the effects that the diminishing food supplies had on POW.[126] After the U.S. entered the conflict, and as the British blockade of German shipping lanes tightened, food supplies became even more critical throughout Germany.[127] For many POW, the difference between life and death came from the relief parcels sent from their home nations.[128]

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[124] "An aspect of its neutrality policy that is seldom mentioned in scholarly studies of American diplomacy during the Great War is the role the United States played in inaugurating the system of camp inspections that played such a vital role in minimizing retaliatory contests among the powers." *Id.* at 187.

[125] "Diplomats visited camps in order to determine which supplies were most critically needed in each place. Naturally, they noted deficiencies. Such inspections however were only incidental to the main purpose of distributing relief supplies. When home nations began to enquire (sic) about the state of their captive soldiers, the inspections took on greater significance in themselves." *Id.* at 21.

[126] *Id.* at 30.

[127] "Early in the war, the British Navy established a blockade of Germany that applied to foodstuffs as well as all potential war materials. This blockade became increasingly effective as the war progressed. The *Kohlrubenwinter*, or "turnip winter" of 1916-1917 was especially harsh. By then long food lines had become a universal feature of German urban life." *Id.* at 73.

[128] "The primary reason that French, British, and American prisoners fared better in captivity than other nationalities is that domestic relief agencies regularly sent them substantial shipments of food." *Id.* at 74.

As a belligerent, the U.S. captured approximately 48 thousand Germans and had 3302 men and 248 officers captured.[129] The treatment which U.S. POW received during their relatively short time in captivity is unremarkable.[130]

V. World War II

A. Introduction

World War II (WWII) evokes distinct images and impressions. Many of the images of the war fought in Europe, for example, are tied to the Holocaust. The war fought in the Pacific recalls notions of a giant mushroom cloud from the first use of a nuclear bomb in Hiroshima. POW treatment during WWII has distinct images also. These impressions, however, are tied to the popular cultural treatment of WWII POW. Whether it is the maniacal Colonel Saito, the Commandant of the fictional POW camp in *The Bridge on the River Kwai*,[131] the bumbling Sergeant Schultz in *Hogan's Heroes*[132] or Steve McQueen in *The Great Escape*,[133] certain WWII POW images are indelible. These portrayals have a loose

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[129] HEADQUARTERS, AMERICAN EXPEDITIONARY FORCES, *Final Report of General John J. Pershing*, September 1st, 1919, *reprinted in* 16 THE STORY OF THE GREAT WAR Appendix lvii (1920).

[130] Which is not to say that WWI POW experience was without its heroes. Lieutenant Edouard Isaacs, the only Naval officer captured during WWI received the Medal of Honor for his escape from a German POW camp. After being taken prisoner, he attempted to escape from a moving train. After he was recaptured, he escaped from a permanent POW camp, swimming the Rhine River to complete his escape. He provided important intelligence on German submarine movements to Allied forces upon his return. *See generally* EDOUARD V. ISAACS, PRISONER OF THE U-90 (1919).

[131] THE BRIDGE ON THE RIVER KWAI (Columbia Pictures Corporation 1957).

[132] *Hogan's Heroes* (CBS Television Productions 1965-1971).

[133] THE GREAT ESCAPE (Metro-Goldwyn-Mayer 1963).

historical basis; they show captor's treatment of POW during WWII was directly tied to the theater in which the POW was captured.

WWII was fought on two fronts. American POW held in Europe therefore had dramatically different experiences than those held in the Pacific. The most obvious difference was the society in which the POW was held. A POW's circumstances in Europe were radically different from his Pacific-based brethren. First, and foremost, most Americans held captive in Europe looked like their captors as well as the surrounding populations. Therefore, an escaping POW could blend into his surroundings more readily. Second, an underground system was in place in Europe to help an escaping POW return to Allied territory.[134] Finally, a POW escaping in Europe could expect to be treated in compliance with the protections of the Geneva Convention upon capture.[135]

A POW held in the Pacific faced a very different experience. Fundamentally, the Japanese culture was not prepared to deal with POW. To the Japanese, the concept of being captured or surrendering was unthinkable; a soldier was either killed in battle, or killed himself before being captured.[136] The Japanese, therefore, treated POW as cowards, and

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[134] M.R.D. FOOTE AND J.M. LANGLEY, MI9 ESCAPE AND EVASION 1939-1945 71-79 (1980). Foote and Langley detail the efforts to develop networks for escaping and evading prisoners. These routes stretched from Brussels, Belgium to the coast of Gibraltar.

[135] Although a number of factors could effect how a captured POW was treated, including the presence of civilians, or local police, a POW captured by either the *Wehrmacht* (German Army) or *Luftwaffe* (German Air Force) were generally treated in compliance with the Law of War. DAVID A. FOY, FOR YOU THE WAR IS OVER 42-43 (1984).

[136] "They were white men, and yellow men had life-and-death power over them. The Japanese had a formal warrior code, *bushido*, that taught soldierly correctness and right attitudes to duty in the warrior's life and the

afforded them little respect or consideration.[137] Secondly, POW held in the Far East were held on islands where they stood out among the population. Should one escape from a POW camp, geographical constraints coupled with a suspicious and hostile population restricted an escapee's options.[138] Finally, the Japanese had signed but not ratified the 1929 Geneva Convention. Although ratification may signal little with respect to actual practice, the Japanese at least indicated a willingness to comply with the 1929 provisions—except where it conflicted with their own laws and regulations.[139]

Therefore, I will approach my analysis of WWII from two very different POW perspectives. Although my examination of the treatment of POW and their conduct while in captivity will continue in the same vein as the analysis of previous conflicts, WWII must be viewed from the perspective of each theater to fully understand its effect on future POW training and conduct.

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warrior's death. But anything touching upon respect for the enemy, or mercy, or restraint, did not carry over into the POW camps of World War II. In the eyes of the Japanese, white men who allowed themselves to be captured in war were despicable. They deserved to die." GAVAN DAWS, PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC 18 (1994).

[137] William Berry pointedly describes this attitude in an incident that occurred immediately after the capture of Corregidor. "One of the Japanese enlisted men had commandeered an American colonel to carry his gear for him. . . .This colonel was an older white-haired man, very distinguished looking . . .here he was loaded down like a pack animal with this Japanese enlisted man's gear on his back, being beaten around the legs and head as he was forced to trot down the road carrying the heavy burden." WILLIAM A. BERRY, PRISONER OF THE RISING SUN 73 (1993).

[138] In describing the Zentsuji POW camp where he was kept, then-Lieutenant Commander Donald Giles pointed out how "the barbed wire and guarded gate seemed ludicrous. It would have been impossible for an occidental prisoner to escape into a society in which he would have stood out dramatically and in which he could not speak, read, or understand the language." DONALD T. GILES, CAPTIVE OF THE RISING SUN: THE POW MEMOIRS OF REAR ADMIRAL DONALD T. GILES, USN 72-73 (1994).

[139] Yuki Tanaka discusses the dynamics of this relationship more completely. Although the Geneva Convention recognizes the right to escape, the Japanese gave their own military law supremacy over the Geneva Convention provisions. This led to the Japanese attempt to have POW sign non-escape oaths discussed below. YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 19-22 (1996).

1. Continuing codification efforts--International efforts to protect POWs continued after WWI. When compared with the codification efforts of the late 19th and early 20th centuries, the 1929 Geneva Convention efforts are considerably more modest. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War attempted to rectify several perceived deficiencies of the 1907 Hague Conventions.[140] In seeking to further define captors' responsibilities toward captives, these clarifications centered on the quantity and quality of food to be provided POW.[141] The 1929 Convention also clarified the lodging requirements for POW.[142] The convention explicitly prohibited physical violence to compel answers to interrogation.[143] Finally, with respect to the Articles that we will use for our analysis, the 1929 Convention clarified punishments for escaping POW, and the punishment authorized for attempted escapes and those POW aiding an escape.[144] The 1929 Convention

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[140] The introductory note to the 1929 Convention states one of the purposes: "Provisions concerning the treatment of prisoners of war are contained in the Hague Regulations of 1899 and 1907. In the course of World War I they revealed several deficiencies as well as a lack of precision." DIETRICH SCHINDLER AND JIRI TOMAN, THE LAWS OF ARMED CONFLICT: *COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 271 (1981).

[141] The 1907 Hague Regulations (HR) provided, in Article 7 that prisoners of war shall be treated as regards board, lodging and clothing on the same footing as the troops of the Government who captured them. *Id.* at 71. The 1929 Article 11 provided that the food rations of prisoners of war shall be equivalent in quantity and quality to that of the depot troops. *Id.* at 276.

[142] HR Article 7 is the only article that mentions lodging. Article 10 of the 1929 Convention states that as regards dormitories, their total area, minimum cubic air space, fittings and building material, the condition shall be the same as for the depot troops of the detaining power. *Id.* at 276.

[143] HR Article 9 states only that a POW "is bound to give, if he is questioned on the subject, his true name and rank." *Id.* at 72. While the 1929 Article 5 states the requirement to declare name and rank, it also contained a prohibition on the use of force to compel further answers. "No pressure shall be exercised on prisoners to obtain information regarding the situation in their armed force or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever." *Id.* at 274.

[144] HR Article 8 provided that escaping prisoners were subject only to disciplinary punishment. *Id.* at 71-72. The 1929 Conventions attempted to distinguish between escaped and those who attempted escape, in Articles 50

was signed by all of the WWII belligerents. As pointed out above, however, the Japanese never ratified its provisions.[145]

B. POW in Europe

1. Interrogation--Although the 1929 Conventions prohibited the use of physical violence to obtain military information, it did not limit an interrogator's freedom to question a POW on such matters. The Germans therefore, took full advantage of the opportunity to question some U.S. POW. The type and manner of the interrogation that captured American POW could look forward to was largely dependent upon the POW's service. The Germans structured their POW camps so that each service was responsible for its respective POW camps. The German *Luftwaffe* was responsible for the interrogation and care of Air Force POW, while the *Wehrmacht* was responsible for captured Army POW. Because of these distinctions, U.S. Army Air Force personnel could look forward to a different interrogation regimen than captured U.S. Army troops.

The *Luftwaffe* developed a series of camps through which Air Force personnel would be passed through while in captivity. The Germans took all Air Force personnel, both enlisted and officer, to a central interrogation center, the Dulag Luft.[146] Here the Germans subjected the person to a course of treatment intended to make him more pliable for questioning. None

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and 51. The 1929 Convention also set up a detailed regimen on disciplinary punishments in Articles 54-59. *Id.* at 285-286.

[145] *Id.* at 296-298.

of the treatment, however, involved physical abuse. Rather, they placed the person in a solitary cell.[147] During the time in the cell, the POW was fed minimal food and water.[148] After a few days of this, serious questioning would begin. The questioning began in surroundings starkly different from those the POW had just left,[149] coupled with offers of cigarettes, chocolate, or a walk to a beer garden.[150] The stark contrast in surroundings clearly conveyed the message that a POW who cooperated with his captors could expect continued favorable treatment.[151]

The interrogator used a variety of information captured from other Air Force personnel to elicit further information from the POW.[152] Although questioning was intended to garner information regarding the technical specifications of U.S. planes, their missions and personnel,[153] the information used to extract this information was often personal, such as

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[146] "The name was actually an abbreviation of Durchgangslager der Luftwaffe (transit camp of the air force)." ARTHUR A. DURAND, STALAG LUFT III: THE SECRET STORY 56 (1988).

[147] Depending on the number of prisoners at the camp, this could be a solitary dirty small cell with very sparse furnishings, known as the "snake pit," or the "small cell" which had the capacity to be heated to such temperatures that the metal bed frame, if touched, would scorch bare flesh. *Id.* at 61, 64.

[148] Or fed well, depending upon the POW's stage in the interrogation process. *Id.* at 67.

[149] "At first, interrogations were carried out in the individual cells at Oberursel, but it was later decided that it would throw the prisoner more off balance if they were interrogated in a sumptuously furnished room instead." FOY, *supra* note 135 at 55.

[150] *Id*. at 56.

[151] DURAND, *supra* note 146 at 66-67.

[152] Durand provides an excellent discussion on the working of the so-called document section at the Dulag Luft. This section was able to tell a person's unit simply by the background of his official photograph, or the type of ink used to check off items on his ration card. *Id*. at 68-69.

[153] "The object was not to learn any great secrets about grand strategy or similar matters . . . Rather, the interrogators sought tactical and operational information that would help the anti-aircraft gunners place their weapons, assist in the evaluation of the latest technical equipment used on the missions, determine important

photos or diaries seized from other POW, or clippings from hometown newspapers.[154] This information kept the POW off-balance, allowing the interrogator to gain the information sought.[155] Through these interrogation techniques, the Germans were able to secure sensitive information from their American captives,[156] although most POW believed they had not provided any information important to their captors.[157]

Wehrmacht techniques appear to have been less sophisticated than those used by the *Luftwaffe*.[158] Therefore, captured Army personnel were not subjected to as rigorous or extensive questioning. Because the majority of captured Army POW were enlisted soldiers, the Germans were not interested in questioning them, and were more concerned with moving them to permanent POW camps.[159] If a particular Army POW was thought to have useful

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targets, and gather small talk that would assist them in breaking down the resistance of future prisoners." *Id.* at 70.

[154] FOY, *supra* note 135 at 56.

[155] Air Force Colonel Donald Spivey, who would later become the Senior American Officer in the Sagan POW camp, the camp which was the site of the great escape, described his own entrance and interrogation in the Dulag Luft. He was "awed" to find out that although he had traveled on secret orders, and was newly arrived to the theater, his interrogators knew he had come from Maxwell Field in Montgomery Alabama, and his wife and son's birthdates. They were also able to tell him about his own posting for a crucial bombing raid on a ballbearing plant in Schweinfurt. DURAND, *supra* note 146 at 67-68.

[156] "One prisoner provided the Germans with a page and a half of technical details about the P-47's combat flying range, its supercharger, its armament, and the tactics its pilots employed." *Id.* at 70-71.

[157] "Most of them did not leave Dulag Luft burdened with a sense of guilt, sincerely believing they had not given any important information to the Germans." *Id.* at 71.

[158] Edward W. Beattie, Jr. an American war correspondent describes his rather unusual interrogation by a German Major who had been disabled on the Russian Front and was now serving as an Intelligence officer. After it became apparent that Beattie would not answer questions about the units he had been assigned to, or their locations, the Major pulled out a bottle of French Brandy, and he and a German Lieutenant discussed politics with Beattie well into the night. EDWARD W. BEATTIE, JR., DIARY OF A KRIEGIE 12-16 (1946).(Kriegie is the shortened version of *Kriegsgefangenen*, which means prisoner of war).

[159] Lewis H. Carlson details the interrogation of Robert Engstrom who was captured on the second day of the Battle of the Bulge. He was questioned by the infamous Jochen Peiper, the German SS colonel responsible for

information, and did not respond to questioning he was usually threatened with questioning by the Gestapo.[160] Jewish POWs of both services might expect more Draconian measures.[161]

This was generally the treatment that American POW could expect after being placed in German military control. But, as the fortunes of war began to turn against Germany, POW status could not always be assured. As a result of American dominance of the air over Germany, Nazi leaders issued a series of decrees concerning downed Allied flyers.[162] Propaganda Minister Joseph Goebbels, playing upon civilian fear of Allied bombing campaigns, incited civilians to beat, shoot, or hang Allied airmen forced to parachute from their disabled planes.[163] His editorials virtually assured civilians who acted against Allied troops that they would not be subjected to prosecution for their actions.[164] Albert Hoffmann, a national defense counselor in Westphalia, took this decree to its logical conclusion.[165]

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the Malmedy massacre, and told that he would die if he did not disclose the locations of American 105mm Howitzer emplacements. Engstrom bluffed his way out of the dilemma by telling Peiper that he was a cook. Engstrom and his fellow prisoner's lives were spared, and he was transported to an interrogation center where he was physically abused, questioned briefly and sent to his permanent POW camp. LEWIS H. CARLSON, WE WERE EACH OTHER'S PRISONERS: AN ORAL HISTORY OF WORLD WAR II AMERICAN AND GERMAN PRISONERS OF WAR 7-12 (1997).

[160] An example of what could happen to those POW who proved particularly recalcitrant is the story of Don Coulson. A captured infantryman, Coulson gave his interrogators such problems that he was turned over to the SS, and after release spent about a month in the Dachau concentration camp before it was liberated. *Id.* at 187-195.

[161] Although many Jewish POW were threatened and verbally abused by their German captors, few were actually taken to special camps. *Id.* at 196 n.4. Sandy Lubinsky was taken to the slave camp Berga with approximately 80 other Jewish POW, and forced to build an underground armaments camp. *Id.* at 194-199.

[162] Hitler issued the first order reflecting the increasingly desperate attitude towards Allied crews with the *terrorflieger*, (terror flyers) order authorizing summary executions of those captured flyers who had machine-gunned passenger trains, civilians, or German planes making emergency landings, on May 21, 1944. FOY, *supra* note 135 at 24. Although there was no effort to determine if a particular aircraft had been involved in such activity. DURAND, *supra* note 146 at 51-52.

[163] Goebbels published two Articles in the *Volkischer Beobachter*, the official Nazi newspaper on May 27, 1944. FOY, *supra* note 135 at 24-25; CARLSON, *supra* note 159 at 29-30.

Although these incidents show an increasing German tendency toward gang justice,[166] accounts by POW saved from lynch mobs by German troops show that the *Wehrmacht*[167] and *Luftwaffe*[168] continued to protect POW when possible. Colonel von Lindeiner, the Sagan POW camp Commandant, went so far as to confront the Gestapo when they interned British Lieutenant Colonel Roger Bushell, one of the masterminds of the great escape.[169]

2. Escapes--As in the 1899 and 1907 Hague Conventions, there is no provision in the 1929 Geneva Convention for the use of deadly force to stop an escaping POW.[170] The

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[164] Goebbels stated plainly "It seems to us hardly possible and tolerable to use German police and soldiers against the German people when they treat murderers of children as they deserve" CARLSON, *supra* note 159 at 29-30.

[165] "Fighter-bomber pilots who are shot down are in principle not to be protected against the fury of the people. I expect from all police officers that they will refuse to lend their protection to these gangster types. Authorities acting in contradiction to the popular sentiment will have to account to me. All police and gendarmerie officials are to be informed immediately of this, my attitude." DURAND, *supra* note 146 at 51.

[166] Martin Bormann, Hitler's confidant, admitted that civilians had murdered Allied flyers. CARLSON, *supra* note 159 at 29.

[167] The story of Joseph R. Beyrle, is one of the truly incredible escape stories of WWII. He jumped into Normandy on D-day, was captured at the Battle of the Bulge and escaped. He was captured again by the Gestapo, after trying to get in touch with underground agents in Berlin. He was "worked over" by the Gestapo for about ten days, until rescued by a *Wehrmacht* captain who took him to Stalag Luft 3, where he escaped a short time later. After escaping, he fought alongside the Russians in the final push towards Berlin before being injured. *Id*. at 142-146.

[168] In an exhibition of the gang mentality which Goebbels probably contemplated, Lieutenant James Keefe and twelve other flyers were subjected to two separate attacks on their way to Oberursel. The first was by a group of factory girls who had to be restrained by *Luftwaffe* guards after demanding that one flier be turned over to them. The second was by an old man who spat into Lieutenant Keefe's face, which almost led to a fight between Keefe and the man, before the man was shoved away by the German guards. DURAND, *supra* note 146 at 52-53.

[169] *Id.* at 308-311.

[170] *See* FLORY, *supra* note 29 at 151, quoting the *Conventions of The Hague: Conference of 1899, p 56*. Although the right to use force was recognized by the 1899 subcommittee, the term was omitted because the subcommittee dealing with the issue thought that no useful purpose could be served in formally countenancing the extreme measure in the body of these Articles.

Geneva Convention provisions regarding escape only address the punishment to be imposed on POW upon recapture.[171] The structure set forth in Articles 54-59 gives camp commandants wide latitude to impose punishment upon failed escapees.[172] The Germans had two regulations, which specifically authorized the use of deadly force to counter POW escapes.[173] In practice, punishment ranged from five days in solitary confinement for a failed first-time escape, with the punishment increasing for subsequent escapes.[174] In addressing POW who had attempted multiple escapes, the Germans set up a *Sonderlager* (special prisoner) camp, Colditz. Colditz's official name was Oflag IV-C, and was not really a camp, but rather a castle.[175] Colditz's stone walls were not enough to hold many of its "hard-core of escape-minded characters."[176]

It is estimated that approximately 26,000 British and 12,000 American POW attempted to escape during the war.[177] A discussion of escapes and evasions would not be complete, therefore, without mention of the British and American agencies set up specifically to aid

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[171] SCHINDLER & TOMAN, *supra* note 140 at 285-286.

[172] Article 54 provides that the duration of any single punishment shall not exceed 30 days. It also provided that a period of three days shall intervene between periods of imprisonment. Article 55 provides that restrictions in food may accompany any disciplinary punishment. *Id*. at 285.

[173] German Regulation Number 29, paragraph 462 and Regulation Number 32, paragraph 504 generally encouraged the POW guards to fire upon escaping POW with the intent to hit. FOY, *supra* note 135 at 125.

[174] *Id*. at 125.

[175] It had been the castle of Augustus the Strong, the elector of Saxony, who had used it as a hunting lodge during the late 17th century. *Id.* at 68.

[176] FOOTE AND LANGLEY, *supra* note 134 at 126-130.

[177] *Id.* at Appendix 1.

POW escape and evasion.[178] MI9 and its American counterpart, MIS-X, attempted to aid captured servicemen in escape attempts by providing escape "kits,"[179] encoded messages,[180] and packages with escape tools and devices.[181] A fair percentage of escapers and evaders were aided by these organizations.[182]

Although the return of these men was no small feat, the greater toll, regarding the effect on the war, was in the numbers of Germans dedicated to search for, capture, detain and return the escapers to their POW camps.[183] Although the Sagan escape led to the murder of 50 of the escapers, the escape committee itself took some solace in the fact that perhaps five million people had been involved in the search for the original 76 prisoners that escaped.[184]

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[178] Foote and Langley, conclude that "The organizing of escape and evasion was one aspect of the world war in which the American and the British could and did co-operate with little of the friction that marked their relations on, say, Asian strategy." *Id*. at 49.

[179] The kit contained water purification tablets, a razor, fishing line, needle and thread, malted milk tablets, matches and a compass among other things, and was curved to conform to the human body. *Id.* at 57-59.

[180] Many of the original coded messages were sent between POW and their families in pre-arranged "Dolly" codes. These codes were subsequently used by MI9 and MIS-X in more elaborate schemes to smuggle in escape materials, such as maps printed on silk scarves that showed the map only after being washed, to money placed between the outer and inner metal skin of powdered milk containers. *Id.* at 105-106.

[181] An elaborate system was developed in conjunction with the coding system to alert POW to packages that contained escape materials. Neither agency used Red Cross parcels to smuggle in items, as the head of MI9 stated, "Never since the war began and never till the war ends will we ever utilize a Red Cross parcel for any work of this nature. They are to us completely sacrosanct." *Id.* at 107.

[182] "It can be fairly claimed that of these (the escapers and evaders) 90% of evaders and 33% of escapers were brought out as a result of MI9 organization and activities." *Id.* at 307.

[183] "It was well known that escapes sometimes had a considerable effect upon the enemy. Every escaped prisoner caused the Nazis to mobilize hundreds of soldiers and a mass escape (five or more people) meant that thousands of police, troops, and civilian volunteers had to turn their attention towards recapturing the escaped men. Escape alarms created havoc at all echelons of the enemy's command structure and upset the local populace. In short, virtually every escape made the enemy divert attention from the war zone to the home front." DURAND, *supra* note 146 at 283.

Unfortunately, this also signaled an end to the era of the prisoner of war, and a beginning in the era of the prisoner at war.[185]

3. Food and maintenance--Although the 1929 Convention clarified the quality and quantity of food provided POW,[186] as in all conflicts, food, or lack of it, was a constant POW complaint. And, as in previous conflicts, the quality and quantity of food provided these POW was directly related to their captor's fortunes. As the war progressed, the amount of food POW received continued to diminish.[187] As in previous conflicts, the supplement received in Red Cross packages[188] proved invaluable to POW.[189]

C. POW in Japan

American POW in Japan had vastly different experiences than POW held in Europe. From capture through release, assuming they did not die, POW held by Japan were subject to

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[184] "There was only one bright point in the whole affair. Bit by bit we pieced together information brought in by the tame guards and eventually established the fact that the rather staggering figure of 5,000,000 Germans had spent some of their time looking for the prisoners, and many thousands of them were on the job full time for weeks. That meant that the break was some sort of success, if one could overlook the heavy cost." PAUL BRICKHILL, THE GREAT ESCAPE 231 (1950).

[185] In his chapter titled "Escape: The Binding Thread" Durand details the change in attitude amongst the POW in Stalag Luft III. The longer a POW remained in captivity, the more likely the attitude shifted from one of safe captivity to viewing the POW camp as the POW new battlefield. This attitude was called into question after the 50 POW who were part of the great escape were shot. DURAND, *supra* note 146 at 282-302.

[186] SCHINDLER & TOMAN, *supra* note 140 at 276.

[187] "The meager rations were repeatedly reduced beginning in the fall of 1944, exacerbating an already serious situation. The food furnished POWs was generally inferior in both quantity and quality, a desperate situation alleviated only by Red Cross benevolence and Yankee ingenuity." FOY, *supra* note 135 at 71.

[188] A Red Cross package generally contained enough food to feed a POW for a week and contained meat, coffee and tobacco. The packages weighed between 5 and 10 pounds. CARLSON, *supra* note 159 at 68.

[189] As the war neared its conclusion, even Red Cross parcels were difficult to come by. Allied air campaigns may have destroyed German railroads, or the parcels were looted. *Id*. at 60.

different captivity, punishment, and maintenance. Therefore, I will depart from the analytical framework used to describe previous POW experiences. Rather, I will show a Japanese course of conduct in their treatment of POW. This course is grounded in the simple premises explained above.[190] Although it is impossible for us to examine the myriad cultural, social and military changes in Japanese society that contributed to this attitude,[191] one military concept will be briefly explored.

The Japanese concept of *bushido* or the "way of the warrior" guided military conduct. *Bushido* emphasized attributes of "self-discipline, together with great tolerance for others."[192] It was corrupted by a Field Service Code that stated specifically that Japanese soldiers should not allow themselves to become POW, [193] revised military regulations which emphasized victory at any cost,[194] and the Meiji Code which treated every order of a superior as coming from the emperor himself. The ultimate consequence of this policy soon followed:

> Some Japanese officers demanded the killing of prisoners. Some encouraged it. Some tolerated it. A few opposed it; but even they endured it. No doubt any number of Japanese officers, and enlisted men, were just following orders, doing their job, whatever that might have meant to them, in service of their emperor. But nothing and nobody stopped the Japanese

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[190] *See* discussion *supra* Part V.C.1.

[191] "A comprehensive treatment of the issue would be a large undertaking (not even a whole book would suffice)." TANAKA, *supra* note 139 at 199.

[192] Officers were taught the code in the military academies. It emphasized that officers carried a high degree of responsibility towards those who served them. *Id.* at 206-207.

[193] This Code was issued in 1941 by then Army Minster Tojo Hidecki who would later be tried as a war criminal for actions regarding POW. *Id.* at 208.

[194] The Japanese military regulations were undergoing a fundamental change in doctrine. The most "prominent change was the emphasis placed on 'fighting spirit' and the concept of victory at any cost. The importance of devotion to the state and the emperor was reiterated in these new regulations." *Id.* at 209.

> from doing whatever they felt like to their surrendered prisoners. *Bushido*, the way of the warrior, meant whatever officers wanted it to mean. Discipline likewise meant whatever they wanted it to. The result was mass atrocity.[195]

The Japanese felt they could treat Allied POW in any manner they felt was appropriate.[196] Because the Allied POW surrendered, a concept that was inconsistent with their own corrupted concept of *bushido*, the Japanese acted with little regard for their health or welfare. As we will see below, the *manner* of capture determined the treatment the POW received.

The Japanese captured American servicemen by the thousands, in relatively short order as they swept through the western Pacific and seized critical islands in the period shortly after the attack on Pearl Harbor.[197] The Japanese attack on Pearl Harbor left the U.S. Navy reeling, leaving the Americans helpless victims on the islands, unable to defend themselves and forcing them to surrender.[198] Guam fell on December 10 1941,[199] followed by Manila shortly after New Year,[200] Bataan on April 9, 1942,[201] and Corregidor in May.[202] The captured Americans would become victims of *Bushido's* corruption. Therefore, POW were

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[195] DAWS, *supra* note 136 at 83.

[196] *Id*. at 74-80.

[197] "When the war broke out, the United States had garrisoned many Pacific islands with a minimum of forces. . . . Shortly after the strike on Pearl Harbor on December 7, 1941, the Japanese attacked and invaded many American installations in the western Pacific, and in less than six months every American in the region was either dead, a prisoner, or actively engaged in guerilla warfare against the Japanese." ROBERT C. DOYLE, VOICES FROM CAPTIVITY: INTERPRETING THE AMERICAN POW NARRATIVE 107-108 (1994).

[198] *Id.* at 108-109.

[199] GILES, *supra* note 138 at 41.

[200] DAWS, *supra* note 136 at 61.

[201] *Id*. at 72.

placed on hellships and transported to Japan after surrendering in Guam.[203] Or, the Japanese forced POW to march through the Bataan peninsula after the fall of Manila and Corregidor.[204]

1. Captivity—The Japanese attitude towards surrendered Allied POW permeated itself in the treatment afforded POW, and manifested itself through measures instituted by the Japanese to prevent escapes. Because the Japanese had not ratified the 1929 Geneva Convention, they attempted to apply their own military and criminal law to Allied POW. In keeping with their law regarding escapes, therefore, the Japanese attempted to have POW sign oaths guaranteeing that they would not escape.[205] The POW uniformly objected to these oaths as against their own military regulations. The Japanese persisted, and ultimately, the oaths were signed.[206] Although some POW signed "under duress"[207] and others signed fictional names,[208] the Japanese saved face and secured the signatures.

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[202] BERRY, *supra* note 137 at 65.

[203] Commander Giles was shipped in the first group of POW to Japan on a fast passenger ship, the *Argentine Maru*, from which all the POW emerged. GILES, *supra* note 138 at 60. In subsequent passages, many POW died from disease while on the trip to Japan in ill-equipped and over-crowded freighters, or because the ships were unmarked, were killed when American submarines destroyed them. DAWS, *supra* note 136 at 285-295.

[204] It is unknown how many POW died along the route, which was really a series of marches and train rides; however, the numbers were likely in the thousands. DAWS, *supra* note 136 at 80. For the total numbers of POW estimated killed during WWII, *see* TANAKA, *supra* note 139 at 3.

[205] Because the Japanese did not recognize the inherent right to escape in the Geneva Conventions, escapes were considered a crime with punishments ranging from one-year imprisonment to death. TANAKA, *supra* note 139 at 19-21.

[206] Giles recounts what was probably a standard reaction amongst POW when told they would sign the oath. His group refused to sign the oath, which resulted in a delay of several weeks. After this period, the senior officers were told that they must sign the oaths for their troops. This request was also refused, with the officers adding the caveat that they could not sign for each individual man in any event. The men were then brought into the commandant's office individually where the senior officers sat at a table with their samurai swords on the table.

The second vehicle the Japanese used to prevent escapes also served to foster division among POW. The Japanese used the "Blood Group of Ten" to discourage escape attempts. POW were assigned to groups of ten, which could be chosen by the POW. If any of the ten escaped, or even attempted escape, the others would be shot.[209] Berry, who escaped with two other Navy officers prior to the order, and lived on the island for three months with help from the Filipinos, was ultimately captured and returned to the camp. When he returned, his chain-of-command ordered[210] him and his two companions to turn themselves in for the good of all the POWs.[211] The Japanese subsequently court-martialed the three officers for the offense and sentenced them to three years imprisonment as special prisoners.[212]

D. WWII Tribunals

WWII's lasting postscript regarding POW treatment may be found in the War Crimes Tribunals held immediately after the war. In Europe and Japan, the soldiers and leaders of

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In this intimidating environment, the POW were again asked if they would sign the oaths. Eventually, each man did sign the oath. GILES, *supra* note 138 at 123-126.

[207] Giles for example ripped the cheap paper the oath was printed on while scratching out "under duress." *Id.* at 125.

[208] Australian prisoners signed "Ned Kelly," a fictional hero, to the oaths. TANAKA, *supra* note 139 at 20.

[209] DAWS, *supra* note 136 at 157-158.

[210] When the three were captured, they had given the Japanese false names. However, they were returned to their original POW camp. Berry was ordered by his former executive officer that there would be no attempt to continue the ruse, and that they would be turned in, if they did not confess. BERRY, *supra* note 137 at 136-137.

[211] It was upon his return that Commander Berry learned of the blood group as he was harassed by his fellow POW and threatened with death by the camp barber. *Id*. at 149.

[212] In contrast to Colditz, the special POW camp the Germans set up, the Japanese special camp required the POW to sit in a small room with other POW and stare at a wall, all day, every day during their imprisonment. *Id.* at 176.

the German and Japanese militaries were called to account for the atrocities we have just detailed.

1. German War Crimes Trials--Although the more famous judgments of the Nuremberg tribunals dealt with "crimes against humanity," treatment of POW served as the basis for count three of the indictments.[213] Allied prosecutors produced evidence at trial regarding isolated incidents involving Allied POW, including the *Kugel Erlass*,[214] and the Malmedy Massacre mentioned above for which Colonel Jochen Peiper was convicted of the murder of 41 Americans at the Battle of the Bulge.[215]

Allied prosecutors solicited substantial evidence from several defendants concerning decrees ordering the killing of Allied flyers. For example, Himmler[216] and Field Marshal Keitel gave extensive testimony regarding the *terrorflieger* orders.[217] Kaltenbrunner, the head of the Security Police testified about his own order regarding the downed flyers.[218]

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[213] WHITNEY R. HARRIS, TYRANNY ON TRIAL: *THE EVIDENCE AT NUREMBERG*, 30-31 (1954).

[214] The K*ugel Erlass*, the so-called Bullet Decree, produced near the end of the war, required the murder of every captured escaped officer or non-commissioned officer prisoner of war, except British or American. The decree was subsequently amended to include certain classes of escaped Soviet POW. *Id.* at 246-250.

[215] Peiper was sentenced to death but his sentence was commuted to a short stay in prison. After he was released, he moved to France and was killed in a mysterious house fire. DOYLE, *supra* note 197 at 109.

[216] Himmler issued the order to police forces on August 10, 1943 telling the forces that they had a duty not to interfere with civilians and downed Allied flyers. IV NAZI CONSPIRACY AND AGGRESSION 49 (1946) [hereinafter NCA, volume and page].

[217] Keitel testified concerning the documents that were circulated during the construction of the order. Although he attempted to deny any knowledge of these orders, he was impeached by the documents that had his own initials on them. *Id.* at Vol. III 531-532.

[218] Kaltenbrunner issued an order "encouraging the pogrom" against the flyers. *Id.* at Vol. IV 304-305.

Keitel[219] and Goering[220] were also called upon to detail decision-making in the killing of the 50 escaped Sagan POW.

2. Japanese War Crimes Trials--Although the Nuremberg trials are better known, Japanese war crimes tribunals also produced convictions for atrocities committed against POW. *Bushido*, the Japanese code of honor, which justified many of the atrocities, was the subject of the court's scrutiny. Australian Brigadier Arthur Blackburn, the senior ranking Allied POW in Cycle Camp, testified that he "was frequently informed by Japanese officers that the policy of the Japanese Government was to treat prisoners only under their principle of 'Bushido.' The principles of the Geneva Convention would be applied only when it suited them, and that prisoners of war had no rights whatsoever."[221] The court also made specific findings regarding the *bushido* code as part of the torture of allied flyers. [222]

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[219] In his testimony, Keitel related how upset Hitler had been with the escape and how the POW would be killed, and their bodies cremated. XI TRIAL OF THE MAJOR WAR CRIMINALS 2-19 (1947-1949) [hereinafter TMWC, volume and page].

[220] Goering attempted to limit his own responsibility regarding the incident, however his credibility was impeached through the statements of one of his deputies, Colonel Ernest Walde. *Id.* at Vol. IX 585-588.

[221] THE TOKYO WAR CRIMES TRIAL 11530, (R. John Pritchard and Sonia M. Zaide eds., 1981)[hereinafter TWCT].

[222] U.S. Air Force Lieutenant Hoffman testified concerning the treatment he and his fellow officers received. The testimony detailed the infamous "water treatment" where a hose was placed in a POW's mouth and the POW was forced to drink until he passed out. Then he was revived and interrogated. When he refused to give any more than his name, rank, and social security number, he was forced into the "knee-spread" where a 3-inch bamboo stalk was placed behind his knees, and his guard began jumping on his thighs. Finally, he was blindfolded and led down a path where he was made to think he would be executed. However, he was told that since it was sunset, he would be executed the next day. "We are knights of the Bushido of the Order of the Rising Sun; we do not execute at sundown; we execute at sunrise." *Id*. at 38030-38047.

Brigadier Blackburn also testified concerning the violent techniques used to secure the non-escape oaths[223] and treatment aboard the "hellships"[224] used to transport POW.[225] The tribunal, in fixing responsibility on Japan's senior leaders for military actions recounted the atrocities of the Bataan Death March,[226] and a Japanese policy of physical abuse, and execution of POW, specifically finding:

> The practice of torturing prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops, both in the occupied territories and in Japan. The Japanese indulged in this practice during the entire period of the Pacific War. Methods of torture were employed in all areas so uniformly as to indicate policy both in training and execution. Among these tortures were the water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging.[227]

VI. 1949 Geneva Conventions

With the experiences of WWII fresh in their collective memory, the international community convened in Geneva again,[228] in an attempt to correct the 1929 Convention's

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[223] Blackburn detailed the beatings the entire camp received after refusing to sign the oaths, and the beatings they received after signing the oaths. *Id*. at 11533-11537.

[224] The court made specific findings regarding unmarked freighters being used as POW transports subjecting them "to allied attacks in which thousands of prisoners perished." *Id*. at 49675.

[225] *Id*. at 11539-11541.

[226] The court found specifically that Tojo knew about the numbers of Allied and Filipino prisoners killed along the march route and did nothing to remedy the situation or punish the wrongdoers. *Id*. at 49645-49648.

[227] *Id*. at 49663.

[228] The meeting was actually planned before WWII. "In January 1939, the Swiss Federal Council transmitted to all governments preliminary drafts, prepared by the International Committee of the Red Cross, as a basis for a diplomatic conference which was planned to be convened in Geneva early in 1940 but could not take place due to the outbreak of World War II. . . . After the end of World War II new drafts were prepared which took account of the experience gained during the war." SCHINDLER AND TOMAN, *supra* note 140 at 299.

failings and further ameliorate the suffering caused by war.[229] The 1949 Convention concerning POW attempted to clarify the shortcomings in several specific areas important to our analysis. First, Article 17 replaced 1929's Article Five concerning the information a POW is required to give his captor,[230] and explicitly prohibiting the use of physical or mental torture to secure information from a POW.[231]

The experiences of Pacific POW were largely responsible for 1949's Article 26. The Asian diet, consisting largely of rice, complied with the 1929 Convention,[232] yet was adverse to Allied POW's health. Therefore, the 1949 Convention placed an affirmative obligation on the detaining power to provide food rations "sufficient in quantity and quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies."[233]

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[229] The 1949 Geneva Conventions are really four conventions: I Wounded and Sick; II Wounded and Sick and Shipwrecked at Sea; III Prisoners of War and IV Civilians. *Id.* at 301.

[230] The 1949 Convention added the "date of birth" language to the basic name, rank, service number which previously had been the information required of POW. This Article formed the basis of the "big four" items found in the Code's Article V. JEAN DE PREUX, III COMMENTARY TO GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 158 (Jean S. Pictet ed., 1960)[hereinafter COMMENTARY].

[231] The 1929 Convention only stated that "no pressure shall be exercised," and POW "may not be threatened, insulted, or exposed to unpleasantness or disadvantage of any kind." SCHINDLER AND TOMAN, *supra* note 140 at 274. The 1949 Convention specifically states that "no physical or mental torture, nor any other form of coercion may be inflicted" on POW. *Id.* at 368.

[232] *See* discussion *supra* at Part V.A.1.

[233] SCHINDLER AND TOMAN, *supra* note 140 at 371-372.

The 1949 Convention also saw the return of use of force provisions similar to those of the 1874 Brussels Convention,[234] when dealing with escaping POW,[235] and were designed to counter WWII abuses. Finally, authorized punishments[236] for failed escapes were further defined, [237] and the elements of a successful escape clearly set forth.[238]

A disturbing aspect of the 1949 Conventions was the Communist block reservation concerning the protections of Article 85:[239]

> As may be seen from the text, the reservation entered by the Soviet Union with regard to Article 85 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War signifies that prisoners of war who, under the law of the USSR, have been convicted of war crimes or crimes against humanity must be subject to the conditions obtaining in the USSR for all other persons undergoing punishment in execution of judgments by the courts. Once the sentence has become legally enforceable, persons in this category consequently do not enjoy the protection that the Convention affords.[240]

Convicted POW, therefore, would be afforded Convention protections only during any proceeding adjudicating guilt or innocence, and upon completion of any sentence served.

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[234] Article 28 stated that "Arms may be used, after summoning, against a prisoner of war attempting to escape." *Id.* at 31.

[235] Article 42 provides that the use of force against escaping POW constitutes an "extreme measure, which shall always be preceded by warnings appropriate to the circumstances." *Id.* at 377.

[236] Article 92, provides that an unsuccessful escapee shall only be subject to disciplinary punishment. *Id*. at 394.

[237] Article 89 and 90 set forth the terms for disciplinary punishments as well as the duration of those punishments. *Id.* at 392-393.

[238] Article 91 defines the elements necessary for a successful escape, which essentially require a POW to rejoin his forces, or leave the territory held by the detaining power. *Id.* at 393.

[239] Article 85 provides that POW criminally prosecuted and convicted under the Detaining Power's laws for acts committed prior to capture shall retain the Convention's protections. *Id*. at 43.

[240] COMMENTARY, *supra* note 230 at 424.

Upon conviction, the punishment would be served in the Detaining Power's prisons, with the Detaining Power's common prisoners.[241] China,[242] Korea,[243] and the Socialist Republic of Vietnam[244] all stated similar reservations.[245]

Despite the Communist block reservation, the 1949 Conventions represent the most extensive POW protection regimen in history and show the tremendous progress made in POW treatment.[246] As our review of POW treatment thus far shows, the statement of principles and protections does little in actual practice when a captor does not comply with the Conventions. This experience will be repeated in subsequent conflicts. For example, the Korean War parties had not ratified the1949 Conventions prior to the war, but they agreed to be bound by its provisions.[247] As we will see next, Korean and Chinese forces' decisions not to comply with these conventions caused the Code to be written. Although stating

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[241] *Id*. at 425.

[242] SCHINDLER AND TOMAN, *supra* note 140 at 500.

[243] *Id.* at 508.

[244] *Id.* at 521.

[245] These countries deviated slightly from the Soviet Union's reservation be making specific reservations to convictions obtained under the "Nuremberg principles."

[246] "It is no exaggeration to say that prisoners of war in present or future conflicts are covered by a veritable humanitarian and administrative statute which not only protects them from the dangers of war, but also ensures that the conditions in which they are interned are as satisfactory as possible." COMMENTARY, *supra* note 230 at 10.

[247] 25 DEP'T ST. BULL 189 (1951).

obligations,[248] the Code fills the vacuum left when a captor does not comply with the Geneva Conventions.[249]

VII. The Korean War

A. Introduction

U.S. POW perceived failings during the Korean War provided the impetus for the Code's drafting. [250] Although public perception of POW conduct during the war was largely negative,[251] the panel appointed by the Secretary of Defense developed facts that painted a different picture of POW conduct:

> A few statistics may prove reassuring to anyone who thinks the Armed Forces were undermined by Communist propaganda in Korea.
>
> A total of about 1,600,000 Americans served in the Korean War. Of the 4,428 Americans who survived Communist imprisonment, only a maximum of 192 were found chargeable with serious offenses against comrades or the United States. Or put it another way. Only 1 out of 23 American POWs was suspected of serious misconduct. [252]

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[248] "The Code of Conduct, on the other hand deals primarily with the burdens to be assumed by the individual captive soldier." George S. Prugh, Jr., *The Code Of Conduct For The Armed Forces*, 56 COLUM L. REV. 697 (1956).

[249] "The nation must recognize the duplicity of an enemy which pays no more than lip service to the Geneva Conventions." 1955 POW REPORT, *supra* note 3 at 31.

[250] Secretary of Defense Wilson, in his Terms of Reference for the Chairman of the Advisory Committee on Prisoners of War, stated: "I am deeply concerned with the importance to our national security of providing Americans who serve their country in battle with every means we can devise to defeat the enemy's techniques. To assure the success of our Armed Force it is equally as essential to arm them with the best weapons of the mind and body as it is to provide them with the machines of war." *Id*. at 37.

[251] In their Letter of Transmittal to the Secretary, the Defense Advisory Committee, upon conclusion of their hearings and deliberations observed: "The prisoner of war situation resulting from the Korean War has received a great deal of adverse publicity. As is stated in our account, much of that adverse publicity was due to a lack of information and consequent misconceptions in regard to the problem." *Id*. at vi.

[252] *Id*.

Nevertheless, the panel felt it appropriate to promulgate a Code to guide U.S. servicemembers should they become captives. [253]

It is beyond the scope of our analysis to determine whether the Code was promulgated based upon the perceptions or upon the statistics stated above.[254] In assessing POW conduct during the Korean War, it is necessary to deal with the conflict on two levels: perception and reality. On one level, the perception exists that American servicemembers failed in the face of Communist indoctrination techniques.[255] On another level, the reality of the Korean War remains: of the 4,428 repatriated POW, and the maximum of 192 who potentially faced judicial punishment, only 14 were court-martialed for misconduct while in captivity, 11 of whom were convicted.[256]

Because the Code was promulgated as a result of the Korean War, we will use the Code itself for our analysis. Each article was designed to counter a perceived U.S. POW failing

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[253] "In concluding, the Committee unanimously agreed that Americans require a unified and purposeful standard of conduct for our prisoners of war backed up by a first-class training program." *Id*. at vii.

[254] The historical context of the Code's writing can not be overlooked. Senator Joseph McCarthy's hearings searching for alleged Communists continued after the Korean War. Besides alleging rampant Communism in the State Department, McCarthy also took on the Department of the Army. This fear of the "Red" threat undoubtedly provided some motivation for the Committee to draft the Code. References to the Communists are prevalent throughout the Committee's report. McCarthy's influence still fascinates modern historians. *See* RICHARD H. ROVERE, SENATOR JOE MCCARTHY (1959), which was re-released in April 1996 with a new foreword by Arthur Schlesinger. The A&E channel has also produced a profile as part of their biography series entitled *Senator Joseph McCarthy: An American Inquisitor*.

[255] "When plunged into a Communist indoctrination mil, the average American POW was under a serious handicap. . . This brainstorming caught many American prisoners off guard. To most of them it came as a complete surprise and they were unprepared." 1955 POW REPORT, *supra* note 3 at 12.

[256] NOTE *Misconduct in the Prison Camp, A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM L. REV. 709, 712 (1956) [hereinafter COLUMBIA NOTE].

while in captivity. Therefore, we will use the Code's articles and discuss the misconduct that it was intended to remedy. We will also look at Korean methods that contributed to U.S. POW misconduct. As a careful analysis of the Code reveals, whether POW conduct is examined through the eye of the psychologist or the sociologist, one conclusion is inescapable: the transition to captured soldiers still being "at war" in the POW camps was complete.[257]

B. The Code as an Analytical Tool

The Code's six articles can be divided into three sections. Articles I[258] and VI[259] remind a POW of his personal responsibilities as a member of the U.S. armed forces, and that those responsibilities do not end upon capture.[260] Articles II[261] and IV[262] point out that the military command and control structure remains intact prior to and during captivity, and that seniors

[257] "A new definition of the status of these prisoners did not achieve full and coherent form in the United States policy until after the war. It was only then that the doctrine evolved that viewed the American soldier in enemy hands as still 'at war' with the enemy." ALBERT D. BIDERMAN, MARCH TO CALUMNY 18 (1963).

[258] The original Article I states "I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense." Exec. Order No. 10631, *supra* note 1.

[259] Article VI states " I will never forget that I am an American fighting man, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America." *Id.*

[260] As pointed out below, while in captivity, under Geneva Convention Article 82, POW are subject to the laws of the Detaining Power. However, this does not mean that offenses committed while in captivity can not be the subject of a later court-martial. This defense was rejected in U.S. v. Batchelor 19 CMR 452, 502-504, *aff'd* 7 USCMA 354 (1957).

[261] Article II states "I will never surrender of my own free will. If in command I will never surrender my men while they still have the means to resist." Exec. Order No. 10631, *supra* note 1.

[262] Article IV states " If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way." *Id.*

and subordinates both have responsibilities within that structure. Articles III[263] and V[264] place affirmative obligations upon POW to resist exploitation attempts and to continue the battle by whatever means are at his disposal.

1. Personal Responsibility Articles, Article I and VI--These Articles were written to remedy the perceived breakdown of discipline in POW camps. After capture, many POW ceased acting like soldiers and began acting like an undisciplined mob.[265] These soldiers viewed the POW camp as a place where the captors were in charge, and there were no longer any responsibilities toward each other.[266] This lack of discipline manifested itself in two ways. First, because the officers and enlisted men had been separated, a bully mentality crept into the camps.[267] Therefore, the biggest or strongest man often would take food from his weaker companions. Second, many men, forced by starvation, chose to simply give up and allow themselves to die.[268] These men were just part of the startling 38% of U.S. POW who died in Korean prison camps.[269]

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[263] Article III states " If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy." *Id.*

[264] Article V states "When questioned, should I become a prisoner of war, I am bound to give only name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause." *Id.*

[265] "Cut off from officers and non-coms who would have given them stability, they were a frightened and leaderless mob." WILLIAM LINDSAY WHITE, THE CAPTIVES OF KOREA: AN UNOFFICIAL WHITE PAPER ON THE TREATMENT OF WAR PRISONERS 85 (1957).

[266] "An American doctor, trying to help these dying teen-agers (sic), reports that they had 'no discipline. Give them an order and they'd say, 'Go to hell'—which was just what the Chinese wanted. They refused to be ordered about, reasoned with, or forced." *Id.* at 88.

[267] "What remained of discipline was, in each squad, the rule of the physically strongest, who might be the squad bully." *Id.* at 87.

2. Command and Control, Articles II and IV--A corollary of the personal responsibility articles is the mandate that leaders should lead those they are responsible for, and not shirk their responsibilities in the face of adversity.[270] The Koreans removed the formal vestiges of military leadership in the POW camps.[271] Although it is difficult to assess the effect this tactic had on the enlisted POW, the absence of leadership clearly affected all POW conduct adversely. [272]

3. POW Affirmative Obligations, Article III and V--The affirmative obligations of Articles III and V are perhaps the best-known provisions of the Code. The Secretary of Defense's panel points out "the duty of a member of the Armed Forces to continue resistance by all means at his disposal is not lessened by the misfortune of capture."[273] But, the resistance provisions of Article III must be read in concert with Article 82 of the 1949

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[268] "At a certain point in starvation a boy would complain he was too weak to go out for chow. He would lie down, pull a blanket over his head to shut out the world, and refuse, first food, even if his buddies brought it (sometimes they didn't bother), then water, and in a few days he would be dead." *Id.* at 86.

[269] 1955 POW REPORT, *supra* note 3 at 25. Contrast this number with the percentage who died in POW camps in WWII, 10.9%. *Id*. at 62. This number is deceiving, however, because a much higher percentage of POW died in Japanese POW camps, *compare* DOYLE, *supra* note 197 at 307, American POW deaths in the Pacific, with deaths in European camps. *Id.* at 303.

[270] "Although the failure to lead was never specified under the Article (Article 133 of the Uniform Code of Military Justice which makes criminal offenses committed by officers which are unbecoming an officer and gentlemen) or any of the others used in the prosecution of officers, that 'offense' appears to be the implicit basis for prosecution for many of their acts." COLUMBIA NOTE, *supra* note 256 at 761.

[271] "Communist prisoner-of-war exploitation in Korea, as everywhere, involved isolating the mass of prisoners from its formal leaders and isolating and cracking down on any overt, noncollaborative leadership that emerged subsequently." BIDERMAN, *supra* note 257 at 168.

[272] "By design and because some officers refused to assume leadership responsibility, organization in some of the POW camps deteriorated to an every-man-for himself situation." 1955 POW REPORT, *supra* note 3 at 12.

[273] *Id*. at 20.

Conventions, to develop the scope of the obligation.[274] Article 82 provides that a POW "shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power."[275] The commentary to Article 82 recognizes "an attempt to escape cannot be considered in the same light as desertion, nor can unrest in a prisoner-of-war camp be assimilated to mutiny in the armed forces."[276] At what point the conduct crosses over from mere resistance to active hostilities is not clear.[277] A record of successful escapes of Army and Air Force personnel does exist,[278] although escaping POW in Korea faced the same obstacles as WWII POW held in Japan.[279]

The misconduct that Article V was intended to remedy received perhaps the greatest amount of attention. Carter L. Burgess, the chairman of the Secretary of Defense's advisory

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[274] The Committee recognized the importance of interpreting these article's obligations in light of Article 82's protections. "Article 82 of the Geneva Conventions Relative to the Treatment of Prisoners of War of August 12, 1949, pertains, must be explained and covered in the training programs to be carried out by the Services." 1955 POW REPORT, *supra* note 3 at 20.

[275] SCHINDLER AND TOMAN, *supra* note 140 at 391.

[276] COMMENTARY, *supra* note 230 at 407.

[277] An example of resistance changing to active hostilities can be seen in the Korean POW riots at Koje-do and Cheju-do islands during the Korean War. As the conflict reached resolution, and the repatriation of POW became an issue, many non-communist POW voiced a preference against repatriation. Screening facilities were set up in the camps to determine which POW did not want to be repatriated. The Communist POW attempted to stop this process through intimidation of the non-Communists, and attempted to put a halt to the screening process. When it became obvious that their demands would not be met, they staged a riot and took the Camp Commandant, Brigadier General Dodd, captive. Eventually, Dodd was released on agreement that the screening process would end, however after Dodd's release, infantry and tank battalions were sent to Koje to crush the rebellion. Ultimately 38 Communist POW and 1 American soldier were killed in the battle. WHITE, *supra* note 265 at 190-196.

[278]Biderman recounts the stories of several successful escapes of Air Force pilots, and states that "the Army is unable to say what proportion were bona fide escapees of the 647 of its men who were missing behind enemy lines and subsequently, in the elegant language of military casualty reports, 'returned to military control—escaped'" BIDERMAN, *supra* note 257 at 88-89.

[279] *Id.* at 87.

committee on prisoners of war, which produced the Code begins his foreword of a Columbia Law Review Article and student note dealing with POW misconduct and the recently promulgated Code, with this tongue-in-cheek statement:

> It has been reported that following the Korean conflict there were no flies in China. Allegedly, the "germ warfare" propaganda of the Red Chinese was so effective that it incited a universal attack on these insects by the Chinese people.[280]

It is clear, that the committee was concerned with the effect of these confessions, as he continues:

> Whether or not this account is correct, we do know the extraordinary lengths to which the Red Chinese exploited the false confessions, statements, broadcasts, and movies that were extorted from our prisoners of war. Similar tactics were not entirely unknown in previous warfare, but never before in American history have our prisoners of war been subjected to such an intense, widespread, and thoroughly executed plan of indoctrination and exploitation as experienced by those soldiers of misfortune who were captured by the North Korean and Red Chinese in the Korean conflict. Thus the struggle that continued after the battle was a struggle for the minds of men.[281]

C. Judicial Response to POW Misconduct

It is difficult to develop a consistent judicial treatment of POW misconduct as a result of the Korean War. Although 14 courts-martial did result from the conflict, these courts-martial all involved Army personnel.[282] Although Air Force pilots admitted to writing "germ

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[280] *Foreword* 56 COLUM L. REV 676 (1956).

[281] *Id.*

[282] COLUMBIA NOTE, *supra* note 256 at 742.

warfare" confessions,[283] none were prosecuted for their misconduct.[284] In contrast, Marine Corps Colonel Frank Schwable, who faced brutal physical and mental torture for a period of five months,[285] was not court-martialed but because he signed a confession his future assignments were severely curtailed.[286]

VIII. The Vietnam War

The Vietnam War provided the Code's first test. As a result of the 1955 Secretary of Defense Committee's efforts, the Code of Conduct became doctrine and was subsequently taught throughout the Department of Defense (DOD).[287] It was not until 1964, that a DOD Directive was published which promulgated a unified approach to Code training.[288] Prior to this time, the services had each developed their own training programs for the Code.[289]

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[283] George S. Prugh Jr., *Justice For All Recap-K's*, ARMY COMBAT FORCES JOURNAL 22 (1955).

[284] 1955 POW REPORT, *supra* note 3 at 82.

[285] COLUMBIA NOTE, *supra* note 256 at 743 n.233.

[286] Although accepting a court of inquiry's findings that Schwable's conduct was "excusable on the ground that it was the result of mental torture of such severity and such compelling nature as to constitute an excuse for his acts," the Marine Corps' Commandant nevertheless decided that Schwable's future assignments would be limited to "duties of a type making minimum demands for their successful performance upon the elements of unblemished personal example and leadership." *Text of Inquiry Findings on Marine Col. Schwable and Comments by Defense Officials,* N.Y. TIMES, April 28, 1954, at 16.

[287] The original report contained a two-page addenda intended to be used in support of instruction in the Code. 1955 POW REPORT, *supra* note 3 at addenda no. 2.

[288] 2 REPORT OF DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT, 1976 II-2 (1976) [hereinafter VIETNAM REPORT].

[289] "From 1955 to 1958, the Services instituted their own training programs for the Code based on the guidance provided in a Sec Def Memorandum of 18 August 1955. . . .However, in 1959 a new Code of Conduct pamphlet contained language emphasizing that the PW should provide the interrogator with only name, rank, service number and date of birth—the 'big four.'" *Id.* at 2.

Given the different service missions, different training programs were not unreasonable. The services adopted different tacts when teaching the critical obligations of the Code's Article V, thereby adding confusion to what was thought to be straightforward language.

The Army, Navy and Marines taught their personnel Article V's obligation was the so-called "big four and nothing more."[290] A POW, when questioned, should give his captors his name, rank, service number and date of birth. These services took a hard-line approach to captivity, feeling that once a POW lost the first battle over this disclosure of information, he would be more likely to disclose classified information and information which could harm Americans.[291]

The Air Force, meanwhile, taught its pilots they should use a more sophisticated approach to captivity using the "ruses and stratagems" approach contemplated by the 1955 Committee.[292] This approach accepted that every man had his breaking point; that a POW should accept that he could be broken, but should develop successive lines of defense short of total capitulation to the enemy's interrogators. [293]

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[290] *Id.*

[291] This philosophy was reflected in DOD pamphlet 1-16 which emphasized that once a POW had gone beyond disclosing the "big four" to his captors, he was on the road to collaboration, and should not expect to fall back on successive lines of resistance. *Id*. at II-3.

[292] The 1955 committee discussed the pros and cons of the "Spartan view" and the "let them talk view." The committee did not commit to either view, choosing to take a middle ground, concluding, "It is recognized that the POW may be subjected to an extreme of coercion beyond his ability to resist. If in his battle with the interrogator he is driven from his first line of resistance he must be trained for resistance in successive positions. And to stand on the final line to the end—no disclosure of vital military information and above all no disloyalty in word if deed to his country, his service or his comrades." 1955 POW REPORT, *supra* note 3 at 18.

[293] VIETNAM REPORT, *supra* note 288 at II-3.

The 1964 Directive did not eliminate the confusion between the two camps. During the Vietnam War, DOD recognized the inconsistencies in the Code's training,[294] which prompted the Navy to adopt the Air Force's approach to training.[295] The Army and Marines, however, continued with the "big four" approach.[296] DOD did not direct any changes in training or in the substance of the Code during the war, because to do so would break faith with those POW in captivity who had upheld the more rigorous Spartan code, and cause later POW additional problems in captivity.[297] The controversy over the Code's proper interpretation also occurred inside the POW camps.

> The debate over how to handle the Vietnamese interrogators preoccupied the POWs. Many clung to a strict interpretation of the Code of Conduct. They argued that to give the enemy anything 'free'—without torture—is to peel away a layer of defense; that no matter how unimportant, even silly, the item might seem, it puts the enemy one step closer to the important things he might seek. Far better to make him work for everything. Hang tough as long as you can.
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> Others advocated a policy of deceit. Be smart. Play it by ear. Give a little where it doesn't matter. When it comes to information of military or propaganda value, lie. If you can't get away with it, then time to clam up.[298]

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[294] "Although an expanded Code of Conduct pamphlet dated 5 June 1967 repeated the strong, "hard-line" language of the 1959 pamphlet, the experiences recounted by early returnee PW's in 1968 caused the Army and Marines to reassess their approach to Code training." *Id.* at II-6.

[295] "The Navy fully implemented 'second line training' for all aviators." *Id.* at IV-63.

[296] "The Army and Marines marched on with 'Big Four.' Army training policy directives did not de-emphasize the 'Big 4' approach until 1971." *Id.* at IV-63.

[297] "Considerable diversities existed, and such action might only exacerbate the problems of new POW's and their commanders in Vietnamese confinement." *Id.*

[298] JOHN G. HUBBELL, A DEFINITIVE HISTORY OF THE AMERICAN PRISONER-OF-WAR EXPERIENCE IN VIETNAM, 1964-1973 153 (1976) [hereinafter HUBBELL].

We will examine how POW used the Code during the Vietnam War, and how the Code's obligations were followed. We will also discover the sometimes tragic consequences of following the Code's provisions for Vietnam POW. Finally, we will discuss the report of the 1976 Defense Review Committee for the Code of Conduct, its findings and recommendations for changing the Code, and its training. From our treatment of the Code in captivity, as well as the subsequent 1976 Defense Review Committee's findings and recommendations, we will see the critical role training in the Code's provisions has in its effectiveness.

A. The Battle Inside the POW Camps

1. Confessions--The Code's drafters correctly assumed that the battle would continue inside the POW camps. Therefore, much as during the Korean War, the battle "for men's minds" continued inside the Vietnam POW camps. Although the battle was still for the POW's mind, the focus of the battle had shifted to include the minds of the American people as well. In the battle over competing propaganda concerning the war, the Vietnamese attempted to use the POW to condemn the war itself.

> It seems clear that when Hanoi began collecting American prisoners of war, it did not know what to do with them or about them. The Communists were a long time coming to a decision. Fourteen months elapsed between the capture of Ev Alvarez (the first American flyer shot down over Vietnam, on August 5, 1964) and the brutalization of Rod Knutson, the first POW to undergo severe torture. Thereafter, many times over a period of many years, many prisoners were told by their interrogators that Hanoi was well aware that it could never defeat the United States on the battlefield, but that it fully expected to win the war—it would win decisively on the propaganda front. It

> would bring a weight of world and American opinion against the American war effort in Vietnam, and in time that weight would prove irresistible.[299]

Thus the Vietnamese began a campaign of torture[300] intended to extort war crimes confessions and statements against the United States.[301] The men who confessed attempted to comply with the Code, but each met with varying levels of success when faced with Vietnamese torture techniques.[302] Some attempted to make up stories about their homes,[303] or their fellow pilots.[304]

As the Vietnamese tortured more POW confessions, the ripple effect in securing other confessions and in lowering camp morale became apparent.[305] Although each POW knew

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[299] *Id*. at 153.

[300] A typical Vietnamese torture technique involved tying a man's arms above the elbow behind him, until his shoulders were about to dislocate. The man could then be lifted into the air and allowed to hang suspended until he consented to write a statement. Or, the ropes could be tightened, causing the flesh to tear. Or, the torture could be done in conjunction with ankle manacles and a heavy iron bar placed upon the ankles. *Id.* at 134-135.

[301] The most famous of these "confessions" was made by Lieutenant Commander Dick Stratton on March 4, 1967. Stratton was forced to appear before a news conference. After his confession was played, he was told to go onto a stage, bow to the crowd and return. He took the stage and bowed deeply at a 90-degree angle to the four corners of the building. He did this four times. He maintained a vacuous look throughout the statement. This caused intense speculation that the Vietnamese had either drugged him or brainwashed him, and backfired on the Vietnamese. SCOTT BLAKEY, PRISONER AT WAR: THE SURVIVAL OF COMMANDER RICHARD A. STRATTON 124-131(1978).

[302] As each POW reached his breaking point, he would confess his sins to his fellow POW, and received encouragement to bounce back. HUBBELL, *supra* note 298 at 133, 142.

[303] One Navy pilot made up a story about his father's chicken ranch in Montana that had 1,000 red chickens on it, which appeased his captors for a period of time. *Id*. at 166.

[304] A famous one of these fictional confessions was written by a Navy pilot and his navigator in which they detailed that two other men in their squadron, "Lt. Comdr. Ben Casey and Lt. Clark Kent, had refused to fly their missions and had been court-martialed and dishonorably discharged." Although their ruse gained them a reprieve from torture, when their confession was published in American newspapers, they were again punished. *Id*. at 243.

[305] Blakey dedicates a chapter in his book to the effect that Stratton's confession and a subsequent news conference had on his credibility in the camp. "Donald Ray Burns was in their minds, the hard-liner; Bomar

that confessions were extracted by torture, few knew the extent of the torture. Some suffered extreme torture,[306] while others agreed to write a confession after little torture or even the mere threat of torture.[307] The confessions led to break downs in hard-fought communications systems and relationships.[308]

2. The obligations to escape--Article III's obligation to escape had disastrous consequences for the POW in Hanoi, and forced a change in the attitude toward escape. In May 1969, Air Force Captains John Dramesi and Edwin Atterberry escaped from the POW camp in Hanoi. The escape was well planned,[309] and the two had managed to compile many things that would help them blend into the local population.[310] They planned to slip into a canal close to the prison and by traveling at night eventually reach the Red River, steal a boat and reach the sea. The two were captured shortly after leaving

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[who himself had performed badly before a visiting delegation of Westerners, had been—and would be—savagely beaten] was in the middle, and I, was as a result of my recent performance, considered to be a soft guy." BLAKEY, *supra* note 301 at 148-149.

[306] Stratton suffered a permanent severe scar on his forearm as a result of having his arms tied behind his back with rope. *Id*. at 152.

[307] Bob Shumaker, who was the second Navy pilot shot down over North Vietnam who was not tortured, was surprised when he discovered that other POW had given confessions without being tortured at all. HUBBELL, *supra* note 298 at 153.

[308] As a result of his confessions, Stratton "was in some quarters already the outcast." *Id*. at 151.

[309] John Dramesi, in his book detailing his captivity in Hanoi, describes the planning preparation that went into the escape attempt. He and Atterberry studied the compound to determine the best location to go over the wall, devised a way to short circuit the bare electrical wire that ringed the compound, and had a courtyard lightbulb broken out to reduce the chances of being detected. JOHN A. DRAMESI, CODE OF HONOR 106-113 (1975).

[310] They made clothing out of burlap bags, acquired peasant-type shoes, and wove bamboo shoots into conical hats. They also developed a type of skin dye from iodine and redbrick dust. *Id.* at 111-112.

the compound. In retaliation for the escape, the Vietnamese punished the entire camp for the rest of the summer.[311]

> Opponents of the Dramesi-Atterberry escape attempt were soon proved correct in their surmise that many would pay dearly for it. By nightfall on Sunday, May 11, the day Dramesi and Atterberry were returned to the Zoo, the place had become the closest thing to hell on earth many Americans were ever to know. Through the cracks and gaps in their cell doors, many watched as the others were marched off to torture chambers in the Auditorium, in the Carriage House, in the chicken Coop, next to the Auditorium, and in the Gook house, which was what the prisoners called the administration building. Men listened, fearfully, prayerfully, to other Americans' screams, to their shrieked pleas for mercy. And they waited themselves to be taken to torture.
>
> The torture went on for months. Twenty-six men were taken. They were locked in hell cuffs and leg irons. They were beaten with fists and clubs. They were rope-tortured. But the primary instrument of torture now was the 'fan-belt,' the rubber whip that was literally cut from an automobile tire. Using these, the Vietnamese literally flayed the hides off their American prisoners.[312]

Atterberry died as a result of the torture he received at the hands of the Vietnamese.[313] The SRO in Hanoi issued a new policy that limited future escape[314] as a result of Dramesi and Atterberry's failed attempt.

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[311] Hubbell devotes an entire chapter, "Summer of Horror, " to the failed escape and its consequences. He characterizes the resulting treatment as "the most brutal torture period of the long captivity." HUBBELL, *supra* note 298 at 493.

[312] *Id.* at 494-495.

[313] Dramesi describes the night of Atterberry's death in his book. "On the night of the eighteenth of May, I could hear them beating Ed. Suddenly the hush of death seemed to fall over the whole prison." DRAMESI, *supra* note 309 at 124.

[314] Dramesi recounts that escape attempts would be authorized based upon a sliding scale of probability of success. The scale served to end all escape attempts in Hanoi. *Id*. at 253.

3. The POW who did not keep faith with their fellow POW—Several POW failed to live up to the Code's appeals to keep faith with their fellow POW while in captivity. This failure came in two forms: un-tortured statements made against the U.S. war effort and acceptance of early release. While in captivity, two senior officers began a campaign of speeches and radio broadcasts[315] extolling the Vietnamese position that the war was illegal and that the United States was bombing civilian targets throughout Vietnam.[316] The response to the broadcasts was devastating.[317] POW who displayed "good attitudes"[318] and who were deemed presentable due to a lack of scars or extreme malnutrition,[319] were released by the Vietnamese as part of a propaganda campaign[320] to show the "humane and lenient" treatment the American POW received.[321] The early release of those POW who had not been authorized to receive early release set off a flurry of discussion among the senior officers

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[315] Navy Commander Bob Schweitzer and Marine Lieutenant Colonel Ed Miller shared a cell in the Hanoi complex. They made a propaganda tape which was deemed the "Bob and Ed Show" by their fellow captives. During the show, they spoke easily about the illegal war that the United States was waging, and that all of the U.S. POW were war criminals and therefore should not abide by the Code. HUBBELL, *supra* note 298 at 478-479.

[316] *Id.* at 524.

[317] "The content of the speeches alone was demoralizing, the fact that the statements were given freely, without any torture being inflicted on the two officers, was outrageous." *Id.* at 479-480.

[318] BLAKEY, *supra* note 301 at 239.

[319] Air Force Major Norris Overly, who nursed John McCain to health after McCain had been severely tortured, was released partly because he had no visible scars or marks. Prior to his release, he was given special food to allow him to gain weight. HUBBELL, *supra* note 298 at 377.

[320] *Id.* at 273.

[321] Stratton recognized the plan, and devised a plan whereby his then-roommate, Seaman Doug Hegdahl, who had fallen off the *USS Canberra*, would memorize as many POW names as he could and accept his early release. BLAKEY, *supra* note 301 at 186.

regarding the terms under which an early release was acceptable.[322] Although these POW, through their conduct had broken faith with their fellow POW, no courts-martial resulted from their activities. Charges were preferred against a number of the POW by fellow POW with whom they had broken faith, but all of the charges were ultimately dismissed.[323]

B. The1976 Defense Review Committee for the Code of Conduct

The Deputy Secretary of Defense appointed a committee to examine POW conduct while in captivity, and the provisions of the Code in 1976. The committee was modeled after the 1955 committee and, similar to the 1955 committee, had a broad mandate.[324] The committee used this mandate to explore the areas discussed above. As in 1955, the Committee chairman assigned different working groups to specific issues.[325] One group addressed the training inconsistency that existed among the services.[326] Another group addressed the specific obligations under Article III regarding escape,[327] and parole.[328] A group was also designated

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[322] "The general opinion was that Overly, Smith, and Methany had disobeyed orders of senior camp officers, broken faith with their fellow prisoners, and given come comfort and a large measure of aid to the North Vietnamese." As a result of the controversy, the plan to have Hegdahl released was rescinded. *Id*. at 229.

[323] Unlike in the period after Korea where POW were investigated for possible misconduct in captivity, the Secretary of Defense issued a policy not to prosecute POW, although charges could be filed by individual POW. The different service secretaries dismissed all the charges that were ultimately preferred. HUBBELL, *supra* note 298 at 601-603.

[324] After the Deputy Secretary of Defense staffed a recommended plan for the makeup of the committee, he instituted their charter on March 26, 1976. He gave them the following instructions: "'In order to formally review the Code of Conduct for members of the Armed Forces of the United States and to reaffirm the validity of the Code of Conduct for its intended purposes or to recommend such changes as necessary, the Defense Review Committee is hereby established.'" VIETNAM REPORT, *supra* note 288 at 4.

[325] *Id.*

[326] *Id.* at IV-57-IV-70.

to study the information a POW was required to give his captors under Article V,[329] and to consider whether the language of Article V needed to be changed.[330]

1. The training inconsistency among the services—Each service approached training the Code in a manner it felt was consistent with the makeup and mission of their force.[331] The committee concluded that this training approach was not in keeping with the spirit of the 1955 committee's recommendations,[332] and recommended a new directive. The directive that emerged contained the "level" distinctions that continue today.[333]

The committee understood that the needs of the services regarding Code training would be different, but wanted to ensure uniformity.[334] To ensure uniformity the committee recommended that a single service be designated the executive agent for all Code training.[335]

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[327] *Id.* at IV-31-IV-32.

[328] *Id.* at IV-32-IV-33.

[329] *Id.* at IV-47-IV-52.

[330] *Id.* at IV-50-IV-52.

[331] The working group assigned to this topic found that "Considerable latitude was taken in this area of 'write your own program,' and that is how it should be. Each service has its own requirements. What is good for an infantry private is not meat (sic) for a B-52 pilot." *Id.* at IV-63.

[332] "There seemed to be either some willful decisions not to comply, or at best a benign neglect of the Sec Def's intent. While Sec Def Wilson may have directed some specific method of reviewing and standardizing actions by the services, we have not been able to find such a directive." *Id.* at IV-64.

[333] *Id.* at I-17-I-33.

[334] "Committee members felt that the OSD must monitor all Code of Conduct and related training in order to prevent inconsistencies and to ensure standardization among the Services." *Id.* at 10-11.

[335] "Discussion indicated that a single Service, i.e., the Air Force should serve as the OSD's executive agent. Committee members also felt the need for an office within OSD to serve as an institutional memory. The OSD's executive agent would then be able to draw upon this memory to ensure that the Services would neither lose sight of the Code's intentions nor impose unrealistic training upon their persons." *Id.* at 11.

The executive agent, coupled with clear guidance in the new directive "would assure a minimum level of training to be given each serviceman,"[336] and provide the necessary continuation training for all servicemembers.[337]

2. The POW's obligation to escape—The committee did not take as much testimony concerning the obligation to escape as the other issues discussed above.[338] The committee concluded the obligation to escape required only "reasonable attempts to escape."[339] The committee also recommended that training directives concerning escape attempts "emphasize that desperate and ill-planned escape attempts are neither required nor desirable under the Code."[340]

3. Acceptance of Parole or Special Favors—Because some type of quid pro quo often accompanies the granting of parole or other special favors,[341] the committee emphasized the Code's resistance obligations, as well as how those obligations are consistent with the Geneva Conventions.[342] The committee addressed the possible conflict between the Code's obligations to resist and the underlying presumption of the Geneva Convention that a POW is

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[336] *Id.*

[337] *Id.*

[338] Of the 48 witnesses called to testify before the committee, only eight testified specifically concerning the obligation to escape. *Id.* at VII-1-VII-173.

[339] *Id.* at 24.

[340] *Id.*

[341] *See* discussion *supra* note 50 regarding parole agreements.

no longer a threat to the enemy, and therefore deserved protection.[343] The committee recognized Convention protections were essential to POW survival, and recommended Article III's explanatory language be expanded to include a discussion of Article III's obligations, as well as the importance of acting in compliance with the Geneva Convention.[344] Although paradoxical, resistance activity that is within Convention protections arguably ensures treatment consistent with Convention disciplinary structures. This protection is developed in the Commentary as it relates to a POW's obligation to escape and the treatment he can expect upon being recaptured:

> A prisoner of war can legitimately try to escape from his captors. It is even considered by some that prisoners of war have a moral obligation to try and escape, and in most cases such attempts are of course motivated by patriotism. Conversely, in its own interest, the Detaining Power will endeavour (sic) to prevent escape whenever possible. This results in the paradox of escape to which A.R. Werner refers: an attempt to escape is considered by the Detaining Power as a breach of discipline and therefore punishable, while the adverse Party considers it as an act which cannot be held to be a crime. Attempted escape is therefore liable only to disciplinary punishment, and not to judicial proceedings.[345]

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[342] "The resistance required is opposition to enemy efforts at interrogation, indoctrination, and exploitation." VIETNAM REPORT, *supra* note 288 at IV-33.

[343] Then-Major George Prugh addressed this concern shortly after the promulgation of the Code. "The Code must be read against the Conventions, with the understanding that the resistance here required is not the kind that constitutes a war crime or an unlawful act. This sentence might more properly read: . . .'I will continue to resist by all legitimate means available.'" PRUGH, *supra* note 248 at 678.

[344] VIETNAM REPORT, *supra* note 288 at IV-33.

[345] COMMENTARY, *supra* note 230 at 445.

Although the Committee noted that these protections are "based on the premise that any future Detaining Power will adhere to the Geneva Conventions,[346] it nevertheless felt it important that the Code be explained in light of the Conventions' protections.[347]

4. Article V's Obligations—Article V's obligations and wording consumed the greatest amount of the committee's time.[348] The committee resolved a difference in training philosophy among the services.[349] The difference in philosophies went to the heart of Article V's provisions concerning the amount of information that a POW could share with his captors, as well as his overall resistance posture.[350] In resolving this dispute, the committee looked to the 1955 committee's intent regarding Article V. The committee concluded that in drafting Article V, the 1955 committee contemplated the "bounce back" philosophy:

> The interpretation issue must be viewed from its historical perspective, returnee comments, the Geneva Conventions and the Service positions. The Secretary of Defense 18 August 1955 Memorandum which provided the implementation policy for Executive Order 10631 did not state that only NRSD should be given to the captor. Rather, training was to be given to equip the individual to resist enemy interrogation by various means including: 'methods and techniques of thwarting interrogation and exploitation; the use of ruses and stratagems

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[346] VIETNAM REPORT, *supra* note 288 at 21.

[347] *Id.* at IV-33.

[348] "The question of changing the wording of Article V is an emotion packed issue but valid reasons do exist to support as well as not to support such change." *Id.* at IV-50.

[349] "Some Services have interpreted Article V as limiting a serviceman to giving only NRSD, [Name, Rank, Service Number, Date of Birth] and they have conducted their training on this basis." *Id.* at 26.

[350] "In summary, the issue of what the DOD policy should be on the interpretation can be disposed of with little controversy since the Services and returnees agree that a liberal interpretation is reasonable. The critical and more difficult task is how best to convey the DOD interpretation—through proper training of the current Code or by changing the Code words themselves and teaching such changes." *Id.* at IV-50.

> to evade and avoid disclosure of important information; (and)
> the necessity of concealing vital military information.'[351]

The 1976 committee found that this technique "seemed to be the most successful technique in dealing with interrogation."[352]

In recommending a change to Article V, the committee balanced a desire[353] to retain the "commandment-like"[354] nature of Article V with the need to provide POW with a pragmatic guide to answering an interrogator.[355] The committee also recognized that the wording chosen mirrored the Geneva Convention requirements for the information a POW was required to give his captors.[356] The committee recommended a small change in Article V, to remove the confusion surrounding its requirements. Ultimately the committee recommended that Article V be changed in two areas. The word "bound" was replaced with the word "required," and the word "only" was removed.[357] Executive Order 12017, issued by

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[351] *Id.* at IV-47-IV-48.

[352] *Id.* at 26.

[353] "The Committee had no desire to change the words of the Code, but it felt the need to clarify Article V's meaning. Many, but not all, members felt that the word 'bound' was an archaic word not easily understood by members of the Armed Forces who might have limited educations." *Id.* at 26-27.

[354] "The Code is considered by many persons as a classic, almost holy, document." *Id.* at IV-51.

[355] "The overwhelming reason to change the Code is to clarify it so that PWs have a realistic idea of what they properly can say and not say." *Id.* at IV-50.

[356] *Id.* at IV-51.

[357] Article V now reads: "When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause." *Id.* at IV-56.

President Jimmy Carter on November 3, 1977 subsequently changed Article V to reflect the recommendation.[358]

IX. Back to the Future?

A. Introduction

We have engaged in this lengthy historical analysis to explore several different themes. The central purpose behind this analysis is to identify from historical trends the need for training servicemembers today and in the future. We have shown how POW treatment has shifted focus, so that the POW is now considered a prisoner at war and no longer a prisoner of war. Throughout our analysis of the prisoner being at war within the POW camp, we have seen how POW treatment has changed throughout history, but we have also seen how in many respects, the more POW treatment changes, the more it stays the same. Despite this country's shift in emphasis from the Cold War[359] to Operations Other Than War, (OOTW)[360] we can cull lessons from our historical analysis that are important to U.S. servicemembers faced with operating in different environments.[361]

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[358] Exec Order No. 12017, 42 Fed. Reg. 57941 (1977).

[359] "The 1993 doctrine reflects Army thinking in a new, strategic era. This doctrine recognizes that the Cold War has ended and the nature of the threat, hence the strategy of the United States as well, has changed." U.S. DEP'T OF ARMY FIELD MANUAL 100-5, OPERATIONS vi (June 1993)[hereinafter FM 100-5].

[360] "Army forces face complex and sensitive situations in a variety of operations. These range from support to U.S., state, and local governments, disaster relief, nation assistance, and drug interdictions to peacekeeping, support for insurgencies and counterinsurgencies, noncombatant evacuation, and peace enforcement. *Id.* at 13-0.

[361] "Operations other than war often are of long duration and undergo a number of shifts in direction during their course. Immediate solutions to difficult problems may not be obvious or may jeopardize long-term objectives. Peacekeeping, for example, demands that the peacekeeping force maintain strict neutrality. One or more of the belligerents may attempt to provoke a response from peacekeeping forces that could undermine long-term

B. Propaganda

In the American Revolution, we saw the first subtle uses of propaganda by British forces who used propaganda concerning the treatment POW would receive in the prison camps as a recruiting tool for enlisting American troops. This technique was used again in the Civil War to recruit large numbers of Confederate troops to fight on this nation's frontiers. The disturbing trend in the use of POW for propaganda purposes within a captor's own country began in the European theater when the Germans used their citizens' fear and hatred against shot-down allied pilots. Active propaganda efforts were also begun when POW were used to broadcast propaganda for their captors.

As propaganda campaigns became more sophisticated, the propaganda battle was expanded beyond the POW camp and taken to the home front, with captured POW being used to make statements supporting their captor's cause, and exhorting their former comrades to join them in the fight against U.S. forces. Although the Koreans did not use torture to extract confessions and propaganda, they had other tools at their disposal. Indoctrination programs, lack of food, and the separation of officers from enlisted combined to make American POW susceptible to Korean propaganda campaigns. The propaganda campaigns continued when technology brought those broadcasts and statements into American homes

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peacekeeping efforts. Certain military responses to civil disturbances may solve the immediate crisis but subvert the legitimacy of local authorities and cause further civil unrest. Humanitarian relief and nation assistance should not promote dependency on aid from outside sources. Quick, efficient action by U.S. forces that resolves an immediate issue without considering the long-term consequences and goals may promote instability. In

during Vietnam. During Operation Desert Shield/Desert Storm, we saw LT Jeffrey Zaun's bruised face transmitted into American homes while he was making statements against the United States.[362]

We can reasonably conclude, therefore, that in future captivity scenarios, American POW will be used as propaganda tools. DOD needs to provide adequate training for servicemembers to effectively deal with these exploitation efforts.

C. Escapes

Escape is the ultimate form of resistance activity in a POW camp.[363] During WWII, Allied POW in Europe, recognizing their duty to escape, formed active escape committees, knowing that enemy time and energy spent preventing escapes or rounding up escaped POW was time that could not be devoted to the combat effort. A POW's obligation to escape brings inherent tensions, though. The greatest tension is in the obligation itself. If the obligation to escape is personal to each POW, what duty does one POW have to his fellows who may suffer the consequences of his act? Further, do a captor's actions that do not comply with Geneva Convention protections concerning escaping POW or the punishment to be imposed on unsuccessful escapees overcome the obligation to escape? Although the

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operations other than war, victory comes more subtly than in war. Disciplined forces, measured responses, and patience are essential to successful outcomes." *Id.* at 13-0-13-1.

[362] *Iraqi Television Again Shows Captured Pilots Denouncing War*, L.A. TIMES, Jan. 24, 1991, at 6.

[363] U. S. DEP'T OF ARMY JOHN F. KENNEDY SPECIAL WARFARE CENTER AND SCHOOL, SURVIVAL, EVASION, RESISTANCE & ESCAPE (SERE) LEVEL C 47 (JAN 1991).

Geneva Conventions provide a structure for punishing escaping POW, we have seen the consequences of failed (or successful) escapes inflicted on POW by captors who chose not to comply with these Conventions, or claimed that they were not applicable.

Because Geneva Convention protections are extended only during international armed conflicts, in future operations[364] U.S. servicemembers who are held captives may face similar scenarios where the right to escape is not recognized, and in fact may be considered criminal under domestic law. We can, therefore, see a need for DOD to train and define the obligation to escape for servicemembers in the future.

D. POW Response to Interrogation

Perhaps the most controversial portion of our analysis has been in determining the information a POW may disclose to his captors. The earliest codification concerning the disclosure of information came in the Lieber Code, and provided the basic guidance concerning name, rank and service number. Subsequent international conventions modified the Lieber Code by prohibiting the use of force to extort confessions or military information. The Code recognizes that a captor may use coercive techniques to compel confessions or

[364] The 1997 National Security Strategy reflects the nature of these future operations: "The U.S. military conducts smaller-scale contingency operations to vindicate national interests. These operations encompass the full range of military operations short of major theater warfare, including humanitarian assistance, peacekeeping, disaster relief, no-fly zones, reinforcing allies, limited strikes and interventions. These operations will likely pose the most frequent challenge for U.S. forces and cumulatively require significant commitments over time." THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 14 (1997).

extract vital military information. It therefore provides POW with a fallback position to avoid disclosing vital information.

After the Code was issued, and prior to the Vietnam War, the services issued inconsistent training guidance concerning the Code. In the Vietnam War we saw the consequences of this training posture as the Vietnamese used torture to extract confessions and propaganda from U.S. servicemen. Confusion surrounding the Code, its obligations and the information that could be provided a captor contributed to POW undergoing unnecessary suffering and a breakdown in POW organizations. The need today for consistency in training is elevated by the nature of the current threat:

> Regional challenges will confront Army forces with an adversary whose system of beliefs interprets differently such fundamental ideas as right and wrong, the value of human life, and the concepts of victory and defeat. What appears to be fanatical to Army forces may be completely rational to their opponent. Understanding cultural differences is important if friendly forces are to establish the military condition necessary to achieve strategic goals. Unlike the Cold War era—when threats were measurable and to some degree, predictable—Army forces today are likely to encounter conditions of greater ambiguity and uncertainty.[365]

The 1955 Committee and the 1976 Committee both stressed the importance of consistency in training. The 1955 Committee stated that "Americans require a unified and purposeful standard of conduct for our prisoners of war backed up by a first-class training program."[366] The 1976 Committee "concluded that Code of Conduct and related training has been

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[365] FM 100-5, *supra* note 359 at para. 1-1.

[366] 1955 POW REPORT, *supra* note 3 at vii.

inadequate and inconsistent among the Services. Without adequate, realistic training, the Code of Conduct may become only an antiquated statement of ideals."[367] In these ambiguous environments, a servicemember's correct knowledge of the Code's intent, and its obligations, is necessary to avoid future failures while in captivity.

E. Conflict and Prisoner Characterization

The consequences of conflict characterization, and the importance to POW have also been developed. We have seen how the treatment a POW receives is often related to how his captor characterizes him. During the American Revolution, American soldiers were deemed rebels, and treated as criminal insurgents. In the Civil War, the Union Congress took special pains not to recognize the Confederacy, while authorizing an exchange of POW. During World War II, the Japanese viewed their POW as common criminals because they had surrendered. By making reservations to the 1949 Geneva Conventions, the Koreans and Vietnamese avoided these conventions' obligations.

We have developed conflict characterization during armed conflict, and a POW's obligations during these conflicts. During future OOTW captured U.S. servicemembers may not receive POW recognition and therefore may receive treatment closely resembling that of just described POW. UN peace operations, for example, may present a wide variety of groups who would not recognize the validity of these operations or the POW status of persons serving in them.

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[367] VIETNAM REPORT, *supra* note 288 at 12.

> U.S. forces involved in peace operations may not encounter large, professional armies or even organized groups responding to a chain of command. Instead, they may have to deal with loosely organized groups of irregulars, terrorists, or other conflicting segments of a population as predominant forces. These elements will attempt to capitalize on perceptions of disenfranchisement or disaffection within the population. Criminal syndicates may also be involved.[368]

Should a U.S. servicemember become one of these groups' captives and in the absence of Geneva Convention protection, with what Code obligations should he be reasonably expected to comply? Although U.S. desires may be to define a captive as a POW with the attendant Geneva Convention protections,[369] this desire would not translate into viable protections to those captured personnel.

X. *Déjà vu'* all over again?

A. Introduction

The 1976 Defense Review Committee, charged with recommending whether the Code's wording needed to be changed, concluded that the Code's wording was clear and recommended only that a change be made to Article V to more clearly reflect its obligations.

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[368] U. S. DEP'T OF ARMY FIELD MANUAL 100-23 V (December 1994).

[369] During the UN mission in the Former Yugoslavia, all U.S. personnel were to be accorded UN "expert on mission" status which would prohibit their detention by either party to the conflict. Although U.S. personnel, in enforcing the terms of the UN mandates may have been required to perform hostile actions, they were to be accorded POW status and protections and be immediately released by their captors. MESSAGE FROM JOINT STAFF, DTG 200348Z FEB 94.

The 1976 Committee also identified a training deficiency in the Code.[370] The Code's original drafters, the 1955 committee, emphasized the need for a first class, uniform training program. This program was not implemented, because of the Services' inconsistent training philosophies. The resulting training programs and the inconsistencies between them struck to the very heart and purpose of the Code. The 1976 committee's recommendations were intended to provide this uniform program. In 1998, the first class training program exists only for those servicemembers in the Level C category. With today's variety of missions and threats, all servicemembers are potential Level B or Level C personnel, as the brief summary of our current posture indicates.

Today's Code training reflects the failings of the Korean and Vietnam wars. The current disparity in training that Level A servicemembers receive as compared to Level C engenders the same confusion in Code obligations as the different interpretations of Article V made prior to the Vietnam War. For example, if a Level A personnel clerk and a Level C pilot were both captured during a contingency operation, whose training would more accurately reflect the Code and its obligations? Further, whose training would aid them in surviving captivity?

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[370] "The 1955 Code and its supporting directions on troop education clearly spelled out the need for the POW to understand interrogation techniques and how to respond. Thus, even though the wheel had been invented and was workable, staff personnel reversed the 1955 board through the power of the pen. And although they now had the wheel, they would insist on installing it incorrectly or on the wrong vehicle." VIETNAM REPORT, *supra* note 288 at IV-62.

This confusion is reflected at the highest levels of DOD. In a March 9, 1998 *Army Times* article, General Hugh Shelton, the Chairman of the Joint Chiefs of Staff, commented on the Code's obligations. While discussing a military confrontation with Iraq, and the possibility that U.S. servicemembers would be tortured into making anti-American statements, General Shelton addressed the Code's obligations.

> To instruct U.S. service people "right up front" that they can tell the enemy "whatever you've got to tell him to survive could end up being the loss of lots of lives."
> "Let's say this is going to be a week or 10-day or 14-day campaign and he goes down the first day, and he tells everything he knows about it, and he knew an awful lot about it that could result in a heck of a lot of casualties far above him."
> "So I think the principle up front ought to be name, rank, serial number et cetera and not divulge the mission and not divulge the concept of operations and hold out on that for as long as you possibly can."
> Shelton said he opposed liberalizing the Code of Conduct. "I'm afraid it's a slippery slope. I think you're better off up front saying you hold out as long as you can" by giving "the minimum information."[371]

A Level C trained servicemember would understand the nuances in the Chairman's statement. However, a Level A servicemember who received Code training only during basic training would be left with one unmistakable conclusion: "Big Four and Nothing More." This misconception, bordering on ignorance of the Code, could follow a servicemember throughout his career, and would influence his own conduct while in captivity. If that servicemember were called to serve during a contingency operation, it would be this inaccurate perception concerning the Code that he would take with him. We have seen how confusion and ignorance concerning the Code adversely affects POW while in captivity.

B. The Training Conundrum

> On the day of battle, soldiers and units will fight as well or as poorly as they are trained. Training to high standards is essential in both peace and war; never can Army forces afford not to train and maintain the highest levels of readiness. Every commander, every soldier, every unit in a force-projection army must be trained and ready to deploy.[372]

Our review of POW successes and failures during this nation's wars have shown what needs to be trained, the challenge comes in determining how to train effectively servicemembers in their Code obligations for potential captivity scenarios. To address this challenge requires changing the doctrine upon which it is based.

1. Peacetime and wartime distinctions must be eliminated to reflect current operational realities— As stated above, DOD Directive 1300.7 must be changed to reflect the realities of this nation's current engagement and enlargement strategy.[373] Therefore, Enclosure 3 of 1300.7, which guides POW conduct in captivity or hostile detention during peacetime must be eliminated. As currently written, these distinctions in captivity situations serve merely to confuse servicemembers. Enclosure 3's specific guidance for peacetime captivity must be merged with Enclosure 2's more general guidance for captivity during conflict.

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[371] Career Briefs, *Shelton wants Code of Conduct kept to minimum information,* ARMY TIMES, March 9, 1998, at 5.

[372] FM 100-5, *supra* note 359 at para. 1-5.

[373] National Security Strategy, *supra* note 364 at 5.

2. Level training distinctions must be changed—All servicemembers are potentially deployable as this country's changing missions focus on force projection. While the level guidance found in 1300.7 might have been appropriate at one time, with this country's change in focus, the level distinctions are no longer appropriate. There are no more "Level A" servicemembers and this level should be eliminated. Level B training should be the minimum standard that all servicemembers should receive.

3. Core guidance in Level B subjects should be changed to more closely reflect Level C guidance—Although distinctions should remain within Level B and Level C personnel, uniformity can be reached regarding the Code's core values. More importantly, uniformity must be achieved in those areas where the Code's terms, written for wartime captivity scenarios, are inapplicable. The following subjects, taught by Judge Advocates on an annual basis, will provide uniform guidance, will eliminate confusion concerning the Code's obligations and will ensure the Code's protections and its intent are fulfilled. These subjects can be taught as distinct subjects during "Sergeant's time" training periods or as part of a more elaborate program in the Code of Conduct. A proposed training schedule in all aspects of POW conduct is included as Appendix A. A stand-alone training packet that can be used as an annual training program in the Code is included as Appendix B.

a. Conflict characterization, and its effect on Code obligations and Geneva Convention protections —A UN mission provided the Code's genesis. The confusion surrounding the UN's role in what could be characterized as a Korean civil war adversely

affected U.S. servicemember's conduct while in captivity. U.S. servicemembers must master conflict characterization as a threshold in defining their status during OOTW. They must also understand the dynamic between Geneva Convention protections and their Code obligations. Finally, all personnel must understand the significance to potential captors of characterizing a conflict as a war, or as OOTW, and the treatment they can expect as a result of this characterization.

b. *Propaganda and authorized POW communication*—As seen by the Chairman's interview cited above, this area is rife with misperceptions. Servicemembers should be taught that resistance behavior begins with the minimum information required to be disclosed. Training should additionally emphasize the "bounce back" model of dealing with a captor's interrogation techniques. Although the more sophisticated ruses and stratagems approach is currently taught only to Level C personnel, a Level B model that emphasizes the information that can be shared with a captor in an interrogation environment can be trained. The historical uses of POW propaganda must also be taught to show why statements should be avoided.

c. The escape obligation and what the obligation entails must be defined--Although we have traced a POW's historical duty to escape during armed conflict, defining this obligation during OOTW is more difficult. Geneva Convention protection and a punishment regime for failed attempts apply during armed conflict. During OOTW conducted in areas without functioning governments or where terrorist groups are in control, these same protections likely will not be extended. Civilian government law may

apply, or a terrorist captor may apply his own version of local law. In these situations, a servicemember's escape obligation must be tempered by the Code's overall purpose of surviving captivity.

XI. Conclusion

The Code's greatest strength is its use as a training tool, a device to guide U.S. servicemembers' conduct while in captivity. It accomplishes this goal by stating simple moral truths, and designing resistance postures to help POW survive captivity. The current distinctions in training mean that not all servicemembers receive the Code's benefits. As U.S. missions across the world change, we must accept that U.S. servicemembers will face new captivity scenarios different than those our lengthy history has revealed. Therefore, those distinctions that prevent the majority of U.S. servicemembers from being trained in the Code must be removed. Further, to meet the demands of these new missions and to revitalize the Code, additional training must be provided which emphasizes the significance of OOTW to U.S. servicemembers held in captivity. Despite the scenario, the majority of U.S. servicemembers are currently ill-equipped to face captivity.

At 42, the Code is not retirement ready. As this middle-aged check-up has shown though, a rigorous training regime is necessary to get the Code in shape to face OOTW challenges that lay ahead.

CODE OF CONDUCT TRAINING SCHEDULE

Characteristics of International Armed Conflict. What makes a war a war? The factors that indicate that a war is an international armed conflict Examples from current wars	Capture and Captivity Discussion of the different stages of captivity and the effects of captivity on a person	**Communication between Captors and Captives** Identify proper and improper communications. Understand what communications are authorized under the Geneva Conventions
Introduction to the Geneva Conventions Overview of the Geneva Conventions, the protections the Conventions provide and when the Conventions are applicable.	*Escape* Discussion of escape techniques, the use of escape committees, when escape is most successful, planning and coordinating escapes	Interrogation Techniques Discussion of different types of interrogation including torture techniques, withholding food, and the use of solitary confinement
Introduction to the Code of Conduct General Overview of Code, its specific articles, and the significance of the Code to U.S. servicemembers	*Communication* Communication techniques within a POW camp, including hand signals, gestures, and tap codes	Propaganda Recognizing indoctrination programs, resistance postures to indoctrination, countering propaganda.
Characteristics of Operations Other Than War Types of operations that are not considered armed conflict. Status of Forces during these operations, significance to soldiers	Organization within the POW Camp Discussion of a typical POW organization. Designation of Senior Ranking Officers, authority of SRO and obligations of senior and subordinates	Statements Avoiding statements, making statements appear the product of torture or indoctrination
Code of Conduct and Geneva Conventions The interplay between the two guidelines for POW conduct. The applicability of these guides during armed conflict and OOTW.	*Practical Exercise* Given a captivity scenario, plan, assess and execute an escape. Communicate using only a tap code or other communication device.	**Cultural Aspects of Captivity** Understanding the role a captor's culture plays in his treatment of POW. Historical examples of treatment.

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